

Report of

# The Treaty Land Entitlement Commission

Leon Mitchell, Q.C.  
Commissioner

January 18, 1983  
Winnipeg, Manitoba



Treaty Land Entitlement Commission  
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January 18, 1983

The Hon. Jay Cowan  
Room 333  
Legislative Building  
Winnipeg, Manitoba

Dear Sir:

I Leon Mitchell, appointed as the Commissioner pursuant to Manitoba Government Order-in-Council 1135 dated the 15th day of September, 1982 to perform the duties set out therein am pleased to submit my report.

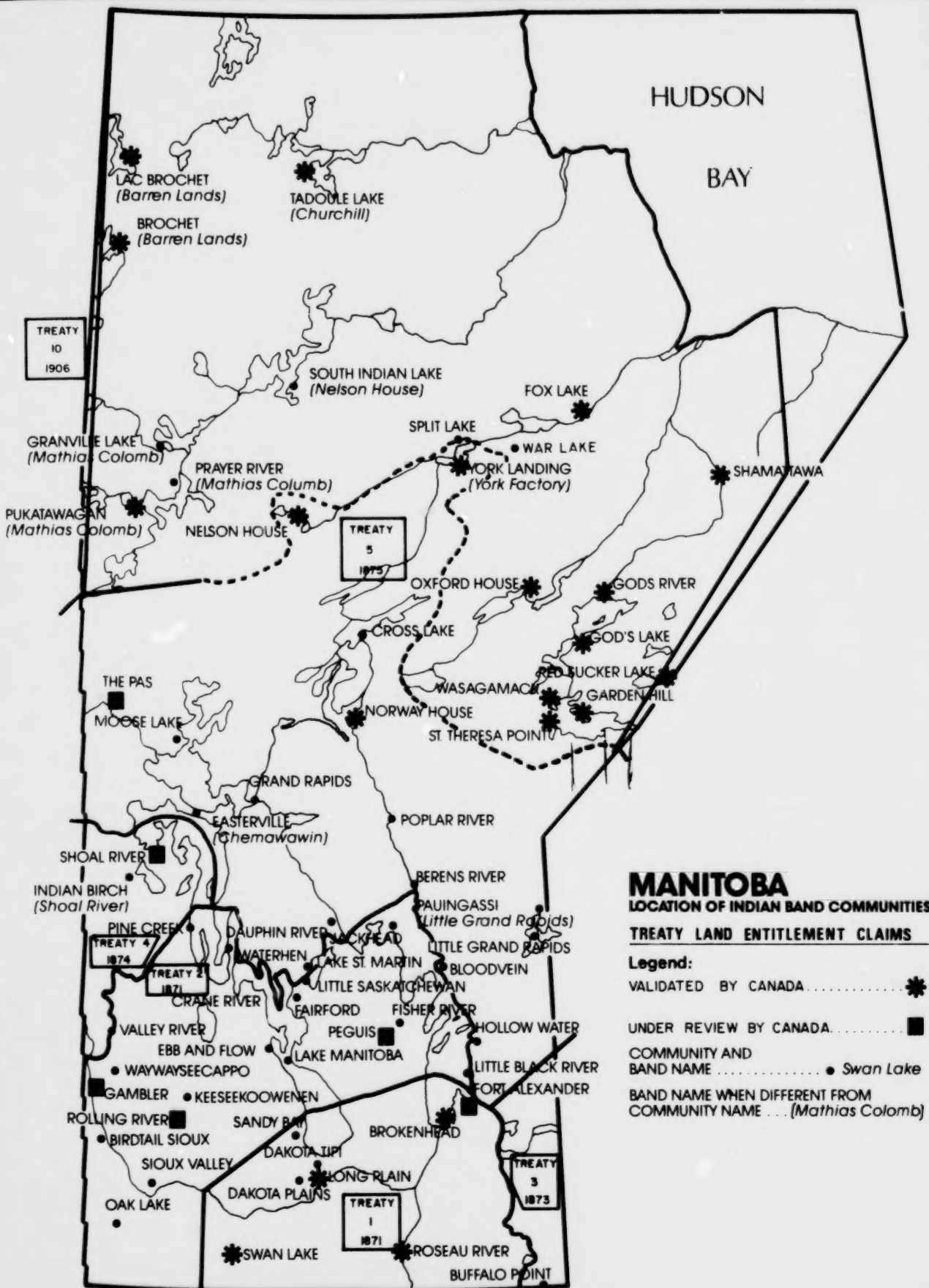
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Leon Mitchell, Commissioner

/jp  
E. & O.E.









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## I. INTRODUCTION

1. The Commission is pleased to note, and the Government and the Indian Bands will no doubt applaud, the nearly universal view expressed in the representations received by it that the unfulfilled land entitlement due to Indians pursuant to the Treaties should be resolved as expeditiously as possible with finality, and that it be settled on a fair and equitable basis.
2. The difficult aspect of the matter is to set out what terms would constitute a fair and equitable settlement in the opinion of reasonable people.
3. Before addressing that difficult problem, mention must be made of the monumental amount of research work done by the Treaty and Aboriginal Rights Research Centre of Manitoba, Inc., (T.A.R.R.), on behalf of the Land Entitlement Chiefs Committee. The Chiefs submitted the results of that research in a binder titled "Treaty Land Entitlement in Manitoba 1970 - 1981". (Appendix "A") It contains 531 pages of well organized material consisting of copies of the relevant treaties and legislation, copies of historical documents, correspondence, and comments which reflect the views and policies of the Governments of Manitoba and Canada as well as the Indian Bands. It reflects a very thorough study of the issues relating to land entitlement.

4. The Chiefs also filed with the Commission 305 pages of research material pertaining to the settlement agreed to between the Federation of Saskatchewan Indians and Governments of Saskatchewan and Canada in 1977. These are titled "Treaty Land Entitlement in Cases of Multiple Survey", and are attached as Appendix "B". That settlement in essence established an agreement between the parties that the amount of land entitlement shall be determined by multiplying the population of a Band as at December 31, 1976 (referred to by the parties as the "current population"), times the number of acres per capita which the Band is entitled to receive pursuant to the terms of the applicable treaty, minus the number of acres already received by that Band. The result of that calculation determines the amount of outstanding land entitlement.
5. The parties in Saskatchewan also agreed that December 31, 1976 shall be a "cut-off date" for purposes of determining the population of a Band. The result is that even though it may take a number of years to implement that agreement, the amount of land entitlement is fixed. Hence, the agreement to accept December 31, 1976 as a "cut-off" date was a meaningful compromise by the Bands, since the parties accepted the use of "current" population as one traditionally used in the settlement.
6. The Chief's Entitlement Committee also submitted a "Statement Regarding the Reasons for the Non-Fulfillment of Treaty Land Entitlement 1871-1970" containing approximately 300 pages of research documents. (Appendix "C") These documents include the Majority (Corbet Locke and

L.A. Prud'homme) and Minority (Robert A. Myers) Reports of The St. Peter's Indian Reserve Commission established by the Government of Manitoba by an order-in-council dated March 22, 1911 (Appendix "D") to inquire into the purported surrender by the St. Peters Band of its reserve in the vicinity of the town of Selkirk, which contained excellent farm lands coveted by the white settlers. That Commission was responsible to enquire into "the facts and circumstances connected with the surrender of the St. Peter's Indian reserve and the subsequent disposal of portions of the said reserve". The majority found that the surrender was invalid. The St. Peters Band was, nevertheless, later compelled to abandon its farm land reserve and accept poor quality land at its present location at Peguis.

7. Another interesting document submitted by T.A.R.R., reflecting the abuse suffered by Indian Bands in connection with the land set aside as reserves for Indians, was set out tersely in the April 14, 1915 issue of the Winnipeg Telegram. A copy of that document is attached hereto and marked as Appendix "E". The headline reads: "PEDLEY, SMART and WHITE MADE HUGE PROFITS OUT OF ILLEGAL TRAFFICKING IN INDIAN LANDS". Those people were no ordinary cheaters. They were in high policy and decision making Government positions. Pedley was the Deputy Superintendent General of Indian Affairs; Smart was Deputy Minister of the Interior, and White was an Immigration Inspector.
8. The kind of incidents described in Appendices "D" and "E" of this report indicate that with the influx of European settlers the officers of the

Superintendent-General of Indian Affairs and the Department of the Interior were more concerned with obtaining surrenders of some of the valuable farm land already reserved for Indian Bands, for purpose of sale at a huge profit to non-Indians, than with devoting attention to obtaining an accurate population count and conveying the additional land entitlement remaining due to many of the Bands.

9. It is well that the parties have a knowledge of some of the facts that reflect and explain, at least in part, the failure over many decades to resolve outstanding Treaty land entitlement.

10. In my opinion it bears repeating that the responsibility to ensure complete fulfilment of land entitlement lay, at all material times, with Canada and not with the Bands or the Province.

## II. THE TERMS OF REFERENCE OF THE TREATY LAND ENTITLEMENT COMMISSION

1. The Government of Manitoba passed Order-in-Council No. 1135 dated the 15th day of September 1982, which established the Treaty Land Entitlement Commission, and which appointed a sole Commissioner. That Order-in-Council reads as follows:

"To The Honourable the Lieutenant Governor in Council  
The undersigned, the Minister of Northern Affairs  
submits for approval of Council a report setting forth that:

WHEREAS section 85 of the Manitoba Evidence Act provides in part as follows:



"85(1) Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

(a) the good government of the province or the conduct of any part of the public business thereof;

(b)

(c)

(d)

(e)

(f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;

he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon."

"90(2) Unless the commission otherwise provides, witnesses shall be examined under oath or affirmation before the commissioners, who shall reduce their evidence to writing either with or without the assistance of a reporter."

AND WHEREAS it is deemed advisable that the matter of a basis for contemporary settlement of treaty land entitlement in Manitoba be reviewed;

NOW THEREFORE he, the Minister, recommends:

1. That Leon Mitchell, Esquire, of the City of Winnipeg in Manitoba, one of Her Majesty's counsel learned in the law, be appointed a commissioner under Part V of the Manitoba Evidence Act, to review, assess, and report upon the basis of contemporary settlement of treaty land entitlement in Manitoba, and more particularly to undertake the following;

a) To invite and record comments from interested individuals, and organizations concerning alternatives which the Government of Manitoba may employ to extinguish treaty land entitlement.

b) To review past and existing policies and practices implemented in various provincial jurisdictions with Canada in their endeavours to extinguish treaty land entitlement.

c) To hold public hearings and to invite, receive and record comments from selective interest groups in order that such interest groups including Indian Bands are provided with full opportunity to state their positions (make known their views) with respect to fair and equitable settlement of treaty land entitlement.

- d) To communicate with concerned individuals and interest groups on an informal basis as may be desirable to ensure free and open dialogue.
  - e) To complete a written report incorporating the nature and substance of representations made to the Commission, and providing recommendations to the Government of Manitoba for general or governing principles for contemporary settlement of treaty land entitlement.
  - f) To complete the aforementioned reports within 105 days of the date of this appointment.
  - g) To make available, upon request by interested parties, photocopies of written submissions that have been filed with the Commission.
  - h) To make the written report available to the general public following review by the Government of Manitoba.
2. THAT the Commissioner may cause witnesses to be examined otherwise than under oath or affirmation.
3. THAT the Commission hereby authorized be known as

"The Treaty Land Entitlement Commission"

Signature \_\_\_\_\_

IN THE EXECUTIVE COUNCIL CHAMBER, WINNIPEG

Upon consideration of the foregoing report and recommendation Council advises that it be done as recommended.

\_\_\_\_\_  
Date

\_\_\_\_\_  
President

AT GOVERNMENT HOUSE IN THE CITY OF WINNIPEG

Approved and Ordered this 15th day of September A.D. 1982

\_\_\_\_\_  
Lieutenant Governor

2. The essential responsibility of the Commission may be summarized as follows:

- a) To invite, receive and record comments from interested individuals and organizations concerning principles that should be considered by the Government of Manitoba in formulating a fair and equitable policy regarding contemporary settlement of unfulfilled Treaty land entitlement; and,
- b) To review past and present policies adopted by other provincial governments in Canada in their efforts to settle unfulfilled Treaty land entitlement; and,
- c) To set out and comment on the views submitted by individuals and organizations, and to comment about the policies and practices in other provincial jurisdictions; and,
- d) To formulate recommendations regarding those matters that must be settled between the representatives of the Bands, Canada and Manitoba for the purpose of achieving a contemporary settlement of unfulfilled Treaty land entitlement on a fair and equitable basis by means of an agreement in writing.

### III THE ACTIVITIES OF THIS COMMISSION

1. The Commission carried out its responsibility to invite and receive comments by placing advertisements in the following newspapers on dates shown:

Winnipeg Free Press - October 8, 9 & 11, 1982.

A photocopy of this advertisement is attached and marked as Appendix "F".

2. Public Hearings were held at the following places on the dates indicated:

Royal Canadian Legion, Burntwood Branch 244 - November 8, 1982  
Elizabeth Drive, Thompson, Manitoba

Norquay Building - November 10, 1982  
401 York Avenue  
Winnipeg, Manitoba

Royal Canadian Legion No. 3 - November 15, 1982  
560-13th Street East  
Brandon, Manitoba

Elk's Club Room - November 17, 1982  
410 Fischer Avenue  
The Pas, Manitoba

3. Advertisements giving notice of these hearings and inviting submissions from the public, to be presented at those hearings, were placed in the following newspapers on the dates indicated:

#### Thompson Public Hearing

Winnipeg Free Press - October 15, 22 & 29, 1982

Thompson Citizen - October 15, 22 & 29, 1982.

Winnipeg Public Hearing

- Winnipeg Free Press - October 18 & 19, 1982 and  
November 1, & 8, 1982
- Winnipeg Sun - October 18 & 19, 1982 and  
November 1 & 8, 1982

Brandon Public Hearing

- Brandon Sun - October 22 & 29, 1982  
and November 3, 1982.

The Pas Public Hearing

Winnipeg Free Press - October 27 & 29, 1982 and November 5, 1982.

Opasquia Times - October 29, 1982 and November 3, & 5, 1982.

4. A sample copy of the advertisements giving notice of these hearings is attached as Appendix "G".
5. The organizations and individuals who made written representations to the Commission either at Public Hearings or by forwarding them to the office of the Commission are listed in Appendix "H".
6. The Commission held informal hearings, as contemplated by item 1(d) of the Order-in-Council, with the representatives of organizations and others, as shown in Appendix "I", which is attached.

IV. THE CLAIMANTS OF TREATY LAND ENTITLEMENT

1. There are twenty-six (26) Indian Bands in Manitoba that claim an unfulfilled land entitlement remaining due under the Treaty applicable to their Band. A list of these is attached as Appendix "J".

2. By letter dated November 5, 1982 from the Hon. J.C. Munro, Federal Minister of Indian and Northern Affairs, to each of the Chiefs of twenty (20) of these Bands, the fact of an unfulfilled land entitlement under the applicable Treaty is "validated". The Federal Government uses the term "validation" when it confirms such outstanding entitlement. A copy of one of these 20 letters is attached hereto, to which is added the name of each of the 20 Bands whose Chief received such a letter, and it is marked Appendix "K".
3. The following is an excerpt from a letter received by the Commission, from the Office of Native Claims (O.N.C.) of the Department of Indian and Northern Affairs Canada, dated November 5, 1982, regarding the status of the other six (6) Bands:

"There are additional six claims under review. One of these, Fort Alexander Band, has been rejected by the Department of Justice because it does not meet the strict legal requirements. However, this office feels that a case can be made on policy grounds to support the claim. We will approach our Minister and seek his support in this matter. If Cabinet approves our recommendation, then the Government of Manitoba will be approached with a request to recognize this band as having a valid treaty land entitlement claim.

There are five other claims under review in Manitoba, they include: Shoal River Band, The Pas Band, Peguis Band, Waywayseecappo/Gambler's Bands and Rolling River Band. At a meeting with Chief Jim Bear and Mr. James Gallo, on October 27, 1982, Mr. R.M. Connelly, Director of Specific Claims undertook to have the documentation organized and a request for legal opinion prepared for the Department of Justice, for the Shoal River Band and the Waywayseecappo/Gambler's Bands, by the end of this month. Given our shortage of human resources, we will be unable to address the other three claims until the new year." (Appendix "L")

V. THE PROCESS OF VALIDATION

1. The decision as to whether there is an unfulfilled land entitlement of any Indian Band is the responsibility of the Government of Canada and the Band affected. It is not a matter which the Province or this Commission has authority to determine. In a letter from the Hon. J.C. Munro to the Hon. J. Gary Lane, Minister of Intergovernmental Affairs, dated November 25, 1982, (Appendix "M"), he states:

"Validation of a claim and determination of what the outstanding federal obligation under the terms of a treaty is a federal responsibility."

2. The Government of Canada reviews any claim of entitlement by each Band, and they determine whether or not the claim should be validated. If Canada validates the claim only then can it be said that there is an unfulfilled land entitlement due to a Band.

VI. THE TREATIES - THE BASIS OF CANADA'S OBLIGATION TO PROVIDE RESERVE LAND

1. The unfulfilled land entitlement of each Band accrues from the provisions of the relevant Treaty signed by representatives on behalf of each Band and the federal representatives of the Crown. The Province of Manitoba was not a party to any Treaty.
2. Attached hereto are copies of Treaties 1, 2, 4, 5, 6 and 10 which are marked as Appendix "N", "O", "P", "Q", "R", and "S".



3. Indian Bands occupied the land that was ceded to the Crown by each Treaty. Those Bands relinquished their rights to that land in consideration of a commitment by the Crown to set aside reserve land for the exclusive use of each Band, and in consideration of other commitments set out in each Treaty.
4. For example, Treaty No. 5 dated 20th day of September, 1815, sets out in part the undertaking regarding land as follows:

"And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families-in manner following, that is to say: For the Band of "Saulteaux, in the Beren's River" region, now settled or who may within two years settle therein, a reserve commencing at the outlet of Beren's River into Lake Winnipeg, and extending along the shores of said lake, and up river and into the interior behind said lake and river, so as to comprehend one hundred and sixty acres for each family of five, a reasonable addition being, however, to be made by Her Majesty to the extent of the said reserve for the inclusion in the tract so reserved of swamp, but reserving the free navigation of the said lake and river, and free access to the shores and waters thereof, for Her Majesty and all Her subjects, and excepting thereout such lands as may have been granted to or stipulated to be held by the "Hudson Bay Company," and also such land as Her Majesty or Her successors, may in Her good pleasure, see fit to grant to the Mission established at or near Beren's River by the Methodist Church of Canada, for a church, school-house, parsonage, burial ground and farm, or other mission purposes; and to the Indians residing at Poplar River, falling into Lake Winnipeg north of Beren's River, a reserve not exceeding one hundred and sixty acres to each family of five, respecting, as much as possible their present improvements:...."

"It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the



said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Two hoes for every family actually cultivating; also one spade per family as aforesaid; one plough for every ten families as aforesaid; five harrows for every twenty families as aforesaid; one scythe for every family as aforesaid, and also one axe; and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone, and one auger for each band; and also for each Chief, for the use of his band, one chest or ordinary carpenter's tools; also for each band enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band one yoke of oxen, one bull and four cows - all the aforesaid articles to be given for all for the encouragement of the practice of agriculture among the Indians...."

"And the undersigned Chiefs, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majest the Queen. They promise and engage that they will, in all respects, obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other Tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts, or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulation of this treaty, or infringing the laws in force in the country so ceded". (emphasis added)

5. It is to be noted that Treaty No. 5 was entered into after the Province of Manitoba was created in 1870. The Treaty sets out the consideration that flowed to the Crown and from the Crown to the Indian Bands. It is clear that the obligations undertaken by the Indians were to the Crown in the right of Canada, and that the obligations undertaken by the Crown in the right of Canada were to the Indian Bands. The province was not involved in any way.

6. The prairie Indians were dependent for their survival upon the wildlife resources, including the animals, fish, trees, wild fruit and other vegetation. They were encouraged by the early European fur-traders to become the harvesters of furs, fish and other natural resources. These natural resources would then be available for sale to the fur-traders, or for barter in return for guns, ammunition and other European goods.
7. When Canada decided to settle the prairies with European farmers who would cultivate the soil, the incentives used to attract settlers included the granting of homesteads to each settler. The opportunity for ownership of virgin land by individuals was very attractive to European settlers.
8. This concept of individual ownership of land was not only unknown to the prairie Indian culture, it was inconsistent with the Indian's desire to exercise his historic lifestyle that was essential to his survival because the Indian had to be free to chase the buffalo, and hunt the fox, the wolf, and the rabbit. The Indian had to move constantly to places where those animals might be found in adequate numbers to meet the survival needs of his extended family.
9. This need for freedom of access to nature's resources was in direct conflict with the European culture and lifestyle which was based on private ownership of land.

10. It was therefore in the self-interest of Canada to enter into treaties with each Band in order to:

- (a) obtain legal rights to all the land occupied by all Bands extant in the entire area, since the Royal Proclamation of 1763 determined that non-Indians could not lawfully settle the land until the Indians had surrendered their interest to the Crown; and,
- (b) restrict the Indian lifestyle by obtaining an undertaking not to trespass on settled or occupied land, ie., to ensure the personal security of the European settler from the wandering Indians; and,
- (c) attempt to persuade the Indians to adopt the lifestyle of the European settler, ie., become sedentary farmers. That attempt was made by promising to reserve lands suitable for farming, as well as to provide farm tools and equipment, oxen, and seed of wheat, barley, potatoes and oats for the encouragement of agriculture among them.

11. The rapid settlement of the prairie lands by immigrant Europeans, the destruction of the buffalo herd, the increasing rate of diminution of the supply of wildlife resources, and the increasing dependency for survival on goods obtainable only from the European traders, impoverished the Indian in his own land and led to the dominant position

of the European settlers and the dependence of the Indian for survival on the non-Indian commerce. The dependency roles after the middle of the 19th century became reversed from the earlier years when the European explorers and early traders had depended on the Indians for survival.

12. The Indians must have been impressed by the oral promises and undertakings of the Crown representatives at the time of negotiation of Treaty. The provisions in the proposed Treaty contained such undertakings as:

- a) "The Queen agrees and undertakes to lay aside reserves for farming lands..."
- b) Lands already cultivated by Indians would be respected.
- c) Farming tools and equipment as well as seed would be supplied by the Crown to any Band who were then "cultivating the soil" or who shall hereafter commence to cultivate the land...." (emphasis added)

13. The oral and written Treaty undertakings by Canada seemed to ensure the well-being of the Indian people. They particularly reflect the Crown's concern that each Band shall be able to achieve independent self-sustenance.

14. The land to be set aside for reserves was therefore to include "farming lands", ie., productive land. The quality of land set aside as reserves for Indian Bands was intended by the Treaty to be land which is capable of being developed for an economic use by the Band for the well-being of its members.

## VII ENUMERATION OF CONCERNS REFLECTED IN THE SUBMISSIONS TO THE TREATY LAND ENTITLEMENT COMMISSION

1. Item 1(e) of the Order-in-Council requires that the Commission incorporate "the nature and substance of representations made to the Commission". The Commission considers that a summary of the concerns expressed by the various individuals and organization will meet that requirement, particularly since each of these submissions are attached as appendices to this report and hence may be read in their entirety.
2. A summary of the concerns of the parties who made submissions to this Commission is as follows:
  - A. of the Norman Regional Development Corporation:
    - a) "Any transfer of land (ie., to reserve status) or recommendation for the transfer of land should take account of and fully protect any pre-existing user, together with any pre-existing right, title or interest"; and,
    - b) "Any such transfer or recommendation should exclude water and land under water"; and,
    - c) "Any such transfer or recommendation should be in respect of land adjoining existing reserve land or, if made in respect

of land not so adjoining, such other land should be easily accessible and should not require the construction or installation of transportation and communication facilities".

B. of the Manitoba Cattle Producers Association:

- a) "any Crown land that is suitable for cattle grazing or haying (should) be set aside strictly for this purpose. This includes land that is presently being used or has the possibility for raising cattle," since, "if this land was allocated to the Indian people, the cattlemen of the M.C.P.A. would lose a great percentage of their income and would no longer be able to produce food for Canadians"; and,
- b) "any land that is allocated to the Indian Bands should be settled in as close an area as possible to the current Band reserve", since, "this would help to alleviate any social resentment problems"; and,
- c) "any land that is presently leased should be left with the present occupant to prevent social anger and biases"; and,
- d) "PFRA's at their present locations and purposes should be retained as is and not considered in the negotiations."

C. of the National Stores Department, The Bay:

- a) "Should occupied Crown land or land which we own and occupy become reserve land through transfer or expropriation, we would strongly recommend that the transaction does not take place until long-term leases are established which would be fair and equitable to both parties"; and,
- b) there is "the necessity of uninterrupted road access to and from our property located in or adjacent to reserve land to enable us to provide goods and services to our customers".

D. of Abitibi-Price Inc.:

- a) "Abitibi-Price Inc. is concerned that claims settled by the addition of reserve lands to existing reserves would adversely affect the logging operations, access or forest regeneration program of the Company.... Any deletion of productive forest lands from the foregoing areas (currently available to the Company) would therefore jeopardize the viability of the Pine Falls Mill"; and,

E. of the Northern Association of Community Councils Inc.:

- a) "we are concerned, Mr. Commissioner, that this development process (of creating some long and short term job opportunities for residents of the non-reserve communities

by using local resources) will be seriously hindered if some of the basic rights and freedoms are lost or tampered with, especially regarding the utilization of resources, as a result of the Treaty Land Entitlement"; and,

- b) "Another important aspect attached to the question of land is; should the Indian Reserve boundaries, along with the natural boundaries, completely encompass the other community, then direct access would not be allowed without further infringing on Reserve land. This has already been experienced as a problem in some northern communities"; and,
- c) "The last, but certainly not the least, important aspect regarding land would be with respect to Indian Reserves acquiring land which the other community already occupies... The non-reserve communities must be assured that this will not happen"; and,
- d) "Another major area of concern, certainly worthy of consideration by the Commission, has to do with the potential conflict, and serious confrontations, that will undoubtedly result among the Native and Northern communities, should the Indian reserves be granted further control of resources that may impede economic and social development opportunity for the non-reserve community".

F. of the Mining Association of Manitoba Inc.:

- a) "...it is the belief of this Association that mineral rights of any land transferred for Treaty land entitlement should be retained by the Province for the benefit and betterment of all Manitobans"; and,
- b) "the Manitoba Natural Resource Transfer Act of 1930 gave ownership and control of the public land in Manitoba, to the Province. As the owner of public lands, the Province has over the intervening years granted rights of various kinds to many parties, both individual and Corporate. Relying on those grants the parties have built on the land, developed industries and farms, and contributed to the growth and prosperity of the Province and all residents of the Province. Those parties relied on rights given by the Province and have a right to continue to so rely. They expect that the Province will continue to honour its obligations and agreements with them", and,
- c) "If sufficient unoccupied Crown land is not available, then some thought should be given to the possibility of money or other compensation in lieu of land"; and,
- d) "Any fair settlement must also take into account not only the rights of the Bands, but also those of others who have



acquired rights in the meantime. These rights were acquired legally, in good faith and on the assumption that any other claims or potential claims had been dealt with. To the extent possible unallocated, unencumbered, unoccupied Crown land should be made available to fulfill Treaty land entitlement claims. This will minimize potential conflict between the rights to be granted to satisfy these claims and existing rights. To the extent there is not sufficient inventory of such Crown land, serious consideration should be given to fulfilling the balance of outstanding Treaty obligations by the payment of money or some other form of compensation."

G. of the Manitoba Lodges and Outfitters Association:

- a) "Over the past 40 years many native people in the Province have become very dependent upon public funds in one form or another...Thinking people have to come to realize that a man cannot maintain his family in any acceptable manner by hunting, fishing and trapping...here we are not dealing with a handful of people, we are dealing with an expanding population whose numbers cannot be sustained by the bounty of the wilderness even in modest modern terms".

H. of the Manitoba Metis Federation Inc.:

- a) "The Manitoba Metis Federation supports the Indian Bands in their desire to see their outstanding land entitlements fully and speedily honored, provided that no infringements are made on the historical and traditional access and use-rights of the Metis to land and water for the purpose of livelihood pursuits or settlement"; and,
- b) "when consideration is given to the actual assignment of specific areas of land for entitlement fulfillment, we wish to be fully informed"; and,
- c) "We also wish to see a straightforward mechanism made available for resolving location disputes if such disputes arise".

I. of E. Deschesnes:

- a) "I think it is time to get rid of Reserves. This is nothing less than segregation of the races. We condemn South Africa for the same abuse."

J. of James R. Olson:

- a) "why don't some of the naive do-gooders from down south come up north and live sometime to see exactly what the Indian problem is. Giving the Indians more land is only going to



further isolate them from the mainstream of North American life and cause more problems".

K. of Mr. Kenneth Emberley:

- a) "I would like to see our debt to the native peoples paid promptly, honestly and in full and in land"; and,
- b) "Historically all the good farm land, all potentially valuable mineral sites known, even all hydro sites that could power a grist mill were reserved for sale or given away to immigrants. The Indians were moved sometimes several times to lower grade land each time"; and,

L. of the Carman Presbytery, the United Church of Canada:

- a) "We have for some years had concerns of justice and equality and opportunity for a viable living by our Native neighbours"; and,
- b) "So when Land Entitlement comes into focus, we must address some concerns to you. Providing the land promised one hundred years ago, now, will hardly make good the lack of it these many years or the dignity and stability that adequate good land would have provided. Nor is it really adequate, for the treaties can hardly be said to have been signed under objective and fair conditions. But surely it is at least a beginning in treating these people fairly. We would strongly hope new conditions would not now be applied like the ninety-nine foot easement from water or the lack of mineral rights. We believe entitlement must be in land...."; and,
- b) "We would encourage you to recommend that these entitlements be made good as soon as possible, and indeed, so that the decision becomes not just another dusty Treaty, like the Northern Flood Agreement has almost become, we would encourage you also to recommend that an implementation committee be established to actively seek out lands or at least be on rigorous watch for lands that come up for sale. These lands need to be adjacent or close to the (existing) reserves and with the approval of the Band, should be purchased".

M. of the Roseau River Indian Band:

- a) "The Treaty formula using current band population statistics would provide some compensation for the long delay in Indian Bands receiving the full amount of lands promised to them"; and,....

(i) "Socio-Economic Reasons for the Treaty Formula

The Treaty formula would provide a more reasonable land base for the economy of the reserve....The shortfall at first survey formula would be a small improvement, but hardly enough to make a significant difference to the reserve economy. ... while it is still doubtful that agriculture could support people in this density, the present plans of the band are to use revenue from agriculture lands to stimulate industrial and commercial development.... The Band might also take non-agricultural lands (provided there is some compensation for this) for hunting, and recreation, or for development of a tourist industry"; and,

(ii) "Political Reasons for the Treaty Formula

This would settle a long standing debt of the government in a way acceptable to Indian people.....

The longer the government waits, the larger Indian bands will be, and the more land the government will have to come up with. Since the percentage of Indian people of the total population is steadily increasing, the political power of Indian people will increase, and it will only be a matter of time before land entitlements must be settled."

N. of the Mathias Colomb Band

- a) "The Band does not agree with the Province's 9 point "Policy Guidelines" dealing with Bands outstanding land entitlement. As a matter of fact, these guidelines proved to be a detriment, when the Band first started negotiating with the Province."
- b) "In August of 1978, the Band Council, the Province and Indian Affairs met to finalize a land selection in the Sissipuk Lake area. This was a start but, as everyone knows, the "Policy Guidelines" became public in October of 1978. Shortly thereafter we received a response to our request. The Province said that the area was inappropriate. In the event, that the land was flooded, it would create three islands and that we should select an area other than one bordering the Churchill River. Let me say at this time, that the Churchill River is our "bread and butter". I'm sure that everyone that lives along this great river would agree with me.

- c) "The Province's rationale is that the area is within the "Water Power Reserve", and as such is inappropriate. Let me say that the Indian people, in the past have always been more than generous and cooperative in their dealings with governments, both Manitoba and Saskatchewan, in concession of reserve lands and prime areas for public projects.
- d) "Isn't it about time that we be given some consideration and some justice in our plight for a just and equitable land settlement?"; and,
- e) "Our immediate need at this time is to give the Band members of Granville Lake and "Lynn Lake" an area for a reserve where they can get all the privileges due to them by the treaties.... We are hoping that we can finally realize a reserve in this (Lynn Lake) area for our Band members so that they can pursue a more orderly existence with pride and honor as hard working people. Let me emphasize, that these people live here year round, pursuing their traditional lifestyles of trapping and fishing. Most of them are employed during the summer months by the tourist camps in the surrounding area. We also wish for them to have reserve status in the Hughes Lake area"; and,
- f) "To conclude, I wish to say, on behalf of the Mathias Colomb Band, that it is our expressed desire that such land settlement be expedited as soon as possible so that we can begin to actually work on settling said reserve areas".

0. of the Island Lake Chiefs:

- a) "For many years since the signing of the adhesion to Treaty No. 5 in 1909, the Indian people of St. Theresa Point, Garden Hill, Red Sucker Lake and Wassagamach Bands have been waiting for the Government of Canada to honor the terms of that agreement which forms the base of the relationship between our people and the Government of Canada. Under the terms of that agreement our fore-fathers gave up all rights, titles and privileges in the area cited in the Treaty - some 133,400 square miles of Northern Manitoba."
- b) "This area is rich in natural resources, minerals, timber, etc., and through it flows the rivers that are harnessed to supply hydro electric power to the citizens of this province. In return our people were to receive certain benefits - reserve land being foremost among them. Although our Bands have received some land we have not received the full extent of the land promised. We have waited for many years and still today the provisions of the Treaty signed some seventy years ago have not been fulfilled"; and,

- c) "Because it is the position of the Island Lake Bands that current populations must be used to calculate land entitlement and because it has been illustrated that it is historically correct to use current population figure, the Bands could not accept the Provincial position. To add insult to injury the Province, through its infamous 9 Points Policy Guidelines, was trying to further narrow our area of selection of entitlement land. The guidelines would have denied our people reserve land all the way to the shoreline and this would cause no end of problem. Again, we could not accept settlement of the issue on these terms outlined by the Province in its Policy Guidelines covering Land Entitlement"; and,

P. of the Peguis Indian Band:

- a) "My opinion about outstanding land entitlement is that they should be fulfilled as expediently as possible. All of our available reserve land is being used up and there are many Band members who don't even have a piece of land in their name to build a house on."
- b) "Another reason for the urgency is because all the unoccupied Crown land is slowly disappearing and most of it is now becoming occupied Crown land."
- c) "I feel that the outstanding land owing to the Indians should have been settled first, before all the valuable land was taken up. After all, it was the trust worthiness and generosity of the Indian people that allowed the settlers to move onto the land which was once owned and occupied by the Indians, which included the whole Province of Manitoba."
- d) "I cannot be so considerate to say that we aren't interested in getting occupied Crown land as part of our entitlement, because we are interested. We feel that we have as much right, if not more, as anyone else to the Crown land surrounding us. We were here first, we should have received the land settlement first".

Q. of the Long Plain Indian Band:

- a) Chief Ernie Daniels stated that the Long Plain Band has experienced considerable frustration during the past ten years in their endeavours to have the Band's entitlement fulfilled. He emphasized that land entitlement business is very important to the Band membership; and,

- b) the Chief expressed his concern about implementation of any agreement that may be reached about resolving entitlement issues. He recommended that a deputy minister who would be accountable to the Minister of Northern Affairs be appointed to deal with the implementation of any agreement having to do with Treaty land entitlement. He stated that deputy minister would ideally have a committee to assist him, and there must be Indian participation in that Committee function. He also said that the Long Plain Band Council has recommended that the deputy minister have the necessary money and technical resources to deal with land entitlement business; and,
- c) Chief Ernie Daniels also stated that he hoped the day will come when Indian people own their own land rather than have it held in trust for them.

R. of the Norway House Indian Band:

- a) ".....we wish to point out that a settlement of outstanding entitlement, to be fair and honourable, must not infringe upon the rights and interests of our Metis neighbours. It is therefore our position that should occupied Crown land be made available for selection for entitlement lands, that the rights and interests of the occupants must be respected."
- b) "The occupants, in our opinion, must be satisfied with the terms of any transfer of such lands and further, it is our position that no non-Indian interests are to be expropriated by either the federal or provincial government, to provide land to be added to our reserve".

S. of the Rolling River and West Region Tribal Council:

- a) "There are however, some provisions of Treaty which are as important now as they were in 1874. One of these is the term regarding schools on every reserve for the education of our children. The other, and, perhaps the most important term, is the setting apart of reserves for each Indian Band"; and,
- b) "We would like to obtain productive agricultural land in addition to other resources. There is a great potential for increased Band revenues through new farm production achieved by band members...", and,
- c) "Tonight, I wish to put into the record of the Commission's proceedings and in answer to our neighbour, that I and my fellow entitlement Chiefs are strongly opposed to any suggestion of expropriating non-Indian interests in any lands which may be selected for entitlement transfers"; and,
- d) "But, as you, Mr. Commissioner, are aware, our Treaties require that reserves must be of economic value to us."
- e) "The principles of fairness and equity demand, in our opinion, that in order to properly fulfill this Treaty obligation, occupied Crown land should made available for selection and that the Federal or Provincial Governments, or both of them, establish a fund so that we may purchase part of our land entitlement at the prevailing market price"; and,
- f) "Should these recommendations be adopted and a Band wishes to acquire a parcel of occupied Crown land, the rights and interests of the occupant must be respected".

T. of the Manitoba Wildlife Federation

- a) "I respectfully submit to you, on behalf of the 15,000 organized sportsmen of Manitoba, several maps upon which we have classified certain Crown lands in certain status areas. This has been in the hope that the Commission will consider the need to leave these special areas as Crown lands, and in the event that these become the subject of negotiations in terms of Treaty land claims, we respectfully request that we be given an opportunity to more specifically outline the needs to leave these as Crown lands. We would at that point be prepared to justify the rationale of this particular request"; and,
- b) "We have classified the entire area of Southwest Manitoba, and in fact have seen fit to transfer it to larger maps for you."



"The Crown land in that area is scattered. It is mainly older formed school sections. It is critical land. The Crown land that is in the Southwest Manitoba is critical land, because it represents the major Winnipeg habitat for whitetail deer and other ungulate."

- c) "These areas are frequently utilized by the public, especially hunters. Moreover, most of these areas are undesignated Crown lands, but they are under lease to area farmers for agricultural purposes, so there is a multi-discipline use on Crown lands in Southwest Manitoba."

U. of Dr. Samuel Corrigan:

- a) "... I would suggest very, very strongly that all rights which can possibly be associated with this land and water be surrendered to the bands. By that it means all mineral rights without any kind of restriction; full timber rights are just as important as most riparian rights, both offshore and onshore. There is a reason why I suggest that."
- b) "It is simply that the possibility of development, especially for the northern Bands, lies in the ownership of natural resources"; and,
- c) "It has been suggested in at least one submission to you that mineral rights should be retained by the Crown. There is an implication there that mineral rights which are given to Indians are somehow lost to Manitoba, and this of course is nonsense"; and,
- d) "Finally, I would suggest that in the selection of land which presumably will be done through negotiations between the Province, or among the Province, the Federal Government and the Bands, there should be a very deliberate emphasis upon the resource potential of the land."
- e) "The land in other words should not be selected simply because it is adjacent or unoccupied, but rather for the development potential of that land in the median term, in the next 30 or 50 years."
- f) "It seems to me, as I mentioned, pointless to give land which does not have a particular benefit. I think there are two points here: One of course is that bands have to be enabled to become self-sustaining. This is an objective of the Treaties".

V. of the Manitoba Keewatinowi Okimakanak:

- a) "For many years the Chiefs of the bands in northern Manitoba have been concerned with the settlement of Treaty land entitlement issue. In some cases northern bands have waited over seventy years for the Government to honour the terms of the Treaties made between the Indian people and Canada..."; and,
- b) "We would urge you to seriously consider the considerable material already forwarded to you which more than adequately documents the historical validity of basing settlement of the Treaty land entitlement issue on the six principles (submitted by the Land Entitlement Chiefs Committee)."

W. of the The Pas Indian Band:

- a) "what the Band would ask is that you give attention to the following concerns of particular interest to The Pas Band."
- b) "Number one.....any land transferred under the settlement finally agreed to, when that selected land is adjacent to a body of water, the boundary of the reserve surveyed must extend to the ordinary high water mark. This is especially important in northern Manitoba where access to water for varied purposes is considered of fundamental importance to the Bands. We depend on the waterways of the north and any land transferred for entitlement purposes must not, in any way, deny to a Band right of access or any other water right accruing to the land selected."
- c) "Number two, another area of concern is access to the lands so selected under the terms of settlement.... As development of entitlement lands would benefit not only the particular band involved, but also indirectly the general public as well, our Band believes that fair consideration must be given any future requests for access routes to new reserves."
- d) "Number three, one of the main purposes of the reserve allotment provision of the Treaty was to provide land for the sole and exclusive use of the particular band. Therefore, it is of extreme importance that reserve land to be received in any settlement of the land entitlement issue conform to this principle."

X. of the The Pas District Farmer's Association

- a) "The Native land use in our opinion does not conflict with agriculture. The farming community here at The Pas has lived with Indian people for almost 200 years and we have existed side by side without any major conflict."



- b) "With this in mind, we emphasize that Native land use is preferred over and above outside special interest groups"; and,
- c) "We, the Farmers Association, give support to the Native land claims in principle and support Native land use in preference to special outside interest groups."
- d) "The division of our community is, we feel, caused by outside interest groups, and we would like this to be an initial step in solving this problem."

Y. of the Canadian Executive Council of Canada:

- a) "It's unthinkable that here we have 6,500 white population in the Town of The Pas completely surrounded by Treaty parcels of land and it also unthinkable for the Treaty people beyond these borders to be completely surrounded by entirely different types of lands that's reserved for other purposes...."; and.
- b) "...and with joint selection, (ie. Indian and non-Indian representatives) I think we can go much further....."

Z. of the Thompson Industrial Commission:

- a) "As the Chairman of the Thompson Industrial Commission I entreat the Commission to consider the following:
- b) "Right of local authorities to encourage future development through "Provincial Land Use Policies" and "Development Plans".
- c) "That all settlements under the Treaty Land Entitlement be fair and just for all citizens of Manitoba."
- d) "That the extraction of resources be under the control of Manitoba."

AA. of Mr. Roy Barr:

- a) "Public access to recreation areas must be available to all Manitobans".

BB. of the Progressive Party of Manitoba:

- a) Mr. Sidney Green's presentation was received by the Commission at the public hearing conducted at Winnipeg on November 10, 1982. His submission was made on behalf of the Progressive Party of Manitoba.

- b) He said there has been a conscientious effort by the government to resolve the matter of land entitlement, and it should not be an underlying premise that there was a consistent refusal on the part of Governments to deal with the issues.
- c) He addressed land entitlement rights of Indian people from alternate points of view, viz, as legal (Treaty) entitlement, and as entitlement of citizens of the Province who have social and economic aspirations.
- d) He said if the matter is perceived as one of legal rights, then there will be a problem with conflicting legal rights, saying that to the extent that Bands succeed in establishing Treaty rights which would affect land owned by the public, the public will have a lesser right than they currently enjoy.
- e) He advised that the matter of entitlement to land should be dealt with on the basis of what all citizens are entitled to, and that all citizens are of equal status and "should be dealt with in that way".
- f) And he concluded by saying that however land entitlements are dealt with, the mineral resources of the Province should continue to belong to all of the people of the Province.

CC. of the Mennonite Central Committee (Canada) and Native Ministries,  
Conference of Mennonites in Canada:

- a) "Our reasons for advocating a prompt and just settlement of outstanding Treaty obligations stems from our Christian convictions and historical experiences in this country and other parts of the world. It is our understanding of our Christian faith that we be advocates of justice. In the European context Mennonites have gained an appreciation of what it means to be dislocated from lands they had owned for generations. Mennonites have also become aware of the unfinished business in the Treaties that made their immigration to Manitoba possible. One of these outstanding issues is the matter of land the Indians were to retain in return for ceding their rights to the remainder of the province. We therefore add our voice to those who advocate the correct and speedy resolution to the just claims of Indian people in Manitoba"; and,
- b) "Mr. Commissioner, we have been very impressed with the thorough research undertaken by the T.A.R.R. group, and recognize that these are consistent with the conditions set out in the actual Treaties, and have an historic precedence in the Agreement of 1977 concerning the unfulfilled Treaty land entitlements in the Province of Saskatchewan. We urge

that this Province respect the precedence set in Saskatchewan in order to avoid dispute over variations in settlement of claims."

- c) "Our anxiety is over the possibility that each Province might settle very differently thus creating a new source of fractioning among the Indian peoples"; and,
- d) "...we wish to express a concern about the implementation of any agreement in principle that might result from these hearings. We emphasize the fact that the agreement in principle can in itself bring about a point of stalling if specific mechanisms for implementation are not included"; and,
- e) "The need for direct access to waterfronts, without shoreline dedication, appears an absolute must as a criteria for land selection. Access to shoreline is not only mandatory for reasons of daily water supply, shorelines are also lifelines, ecologically speaking, since a number of fur-bearers depend on stable water levels, like fish do for their spawning areas."
- f) "The establishment of a new reserve boundary...with a 99-foot retention of lands to the Provincial Government reflects, in our opinion, the height of ecological and cultural ignorance, and I think violates earlier kinds of precedences as well as the 1930 Agreement"; and,
- g) "We ....urge that....encumbrances on available Crown lands not be a deterrent for the allocation of suitable lands, provided that those who hold interest in such lands be fully and fairly satisfied (and) that where unencumbered Crown lands are not available, the Federal Government make available funds to be used to purchase privately patented lands to settle some entitlements."

- and -

of the Interchurch Coalition On Resource Development in Manitoba, the Inter-Task Force, Native Ministries of the Conference of Mennonites in Canada and Native Concerns of Mennonite Central Committee (Canada):

- a) "... A legally enforceable agreement in principle will need to be negotiated between the Chiefs Treaty Land Entitlement Committee and the Province of Manitoba and subsequently with the Government of Canada. ... The Indian Bands affected by this agreement...will need to make their selection of land, compensation or a combination thereof...We propose that a panel be named to adjudicate the submissions made by the affected Bands. We propose that the panel consist of an

appointee of the Department of Indian Affairs, an appointee of the Government of Manitoba, an appointee of the Chiefs Treaty Land Entitlement Committee and a fourth party appointed jointly by the other three parties and not having a vested interest in the issue. The fourth member of the panel should also be considered by convenor of the panel. The purpose of the panel would be to process each of the individual submissions brought forward by the Bands and make recommendations to the Minister of Natural Resources of the Province of Manitoba for final implementation."

- and -

of the Manitoba Interchurch Coalition on Resource Development:

- a) "Perhaps under that term of reference you (the Commissioner) might be able to suggest some means, perhaps an independent public monitor that could be established, fully funded and with power to compel compliance; someone distinct from both Government and Administration yet with sufficient authority to be the keeper of the promise"; and,
- b) "If you could find ways that could ensure that what is gained by Native people in negotiation would not later be lost or denied through Administration, that would be quite an accomplishment".

DD. of the Manitoba Hydro:

- a) "Because Indian Land Claims can have an adverse impact on both present and future power developments, Manitoba Hydro recommends continuing and formalizing the present method of reviewing these claims through the Indian Land Claims Working Committee. Experience has shown that the Committee has been able to make adjustments in claims which have been acceptable to all concerned."
- b) "Because land is necessary for both resource and community development, to assist in the fulfillment of Indian Treaty obligations the Province of Manitoba established "The Indian Land Claims Working Committee", as a vehicle to respond to Indian land entitlement claims."
- c) "Manitoba Hydro believes that the Indian Land Claims Working Committee has been successful in expediting Indian land claims, and where necessary, in making adjustments to such claims to the general satisfaction of all interested parties."

EE. of the Thompson Wildlife Association:

- a) "The available recreation areas for the citizens of Thompson, and guests to our community are very limited, should any of the fishing, hunting, and camping areas that now exist be lost it would most severely limit the available outdoor recreation, both for local residents and the many tourists who visit our area"; and,
- b) "Reserve land is private land, with no admittance to non-residents of that reserve, public access should always be available to these recreation areas for the tax paying residents of this district and to the many tourists who visit northern Manitoba."

FF. of the Manitoba Committee of the Communist Party of Canada:

- a) "The Manitoba Committee of the Communist Party stands in total agreement with the six principles formulated by the Chiefs' Entitlement Committee as a basis for settling these outstanding grievances"; and,
- b) "Our party is most emphatic in our belief that calculations to determine the amount of land owing to the various Bands should be made on the basis of current population figures."
- c) "Any transfer of lands to the Indians bands must be on the basis of a full transfer of title, including transfer of title, including transfer of mineral, forestry, water and other rights"; and, "However, having said this, we are not indifferent to the plight of smaller, individual land holders and others who may, through no fault of their own find themselves utilizing lands which are rightfully Indian lands, and urge that the Commission recommend some form of compensation for these individuals, either in the form of alternate lands or in cash"; and,
- d) "It is imperative that any lands designated for transfer to the bands be lands which are acceptable to the Bands..... we respectfully submit that the Commission has an historical obligation to ensure that lands transferred to the Bands meets the needs of the Bands, are productive lands, suitable for development by the Bands".

GG. of the Treaty Land Entitlement Chiefs Committee (which made a total of nine submissions):

- a) The concerns of the Land Entitlement Chiefs Committee are considered and discussed in this report when dealing with the specific issues that are relevant to reaching a fair and equitable settlement of the unfulfilled Treaty land entitlement due to Indian Bands.

VIII. PREEMINENT TOPICS REFLECTED IN THE SUBMISSIONS TO THE TREATY LAND ENTITLEMENT COMMISSION

1. The matters that have been referred to most frequently by persons who have made submissions to this Commission are those stated as follows:

- a) That the quantum of entitlement ought to be calculated by using current population statistics of each Band entitled to more land has been the submission of:

- (i) the Roseau River Indian Band; and,
- (ii) the The Pas Indian Band; and,
- (iii) the Norway House Indian Band; and,
- (iv) the Rolling River Indian Band; and,
- (v) the Island Lake Chiefs; and,
- (vi) the Manitoba Keewatinowi Okimakanak; and,
- (vii) the Land Entitlement Chiefs Committee; and,
- (viii) the Manitoba Interchurch Coalition on Resource Development; and,
- (ix) the Manitoba Committee of the Communist Party of Canada; and
- (x) Dr. Samuel Corrigan.

- b) That the precedent of the Saskatchewan Formula, ie., calculating entitlement on the basis of the population of



each Band as of December 31, 1976, ought to be adopted was the submission of:

- (i) the Mennonite Central Committee (Canada) and Native Ministries, Conference of Mennonites in Canada.
- c) That rights to mines and minerals (and/or timber rights and/or riparian rights) on or within the reserves ought to be set aside for the use and benefit of each Band was the submission of:
- (i) Dr. Samuel Corrigan
  - (ii) the Manitoba Committee of the Communist Party of Canada; and,
  - (iii) the Carman Presbytery, the United Church of Canada; and,
  - (iv) the Land Entitlement Chiefs Committee; and,
  - (v) the Island Lake Chiefs; and,
  - (vi) the Norway House Indian Band; and,
  - (vii) the Rolling River Indian Band; and,
  - (viii) the Manitoba Keewatinowi Okimakanak; and,
  - (ix) the The Pas Indian Band; and,
  - (x) the Manitoba Interchurch Coalition on Resource Development.
- d) That certain Crown land or interests in land ought not be made available for transfer to reserve status was the submission of:
- (i) the Manitoba Cattle Producers Association concerning Crown land that is suitable for cattle grazing or haying; and,
  - (ii) the Norman Regional Development Corporation concerning water and land under water; and,
  - (iii) the Northern Association of Community Councils concerning land which non-reserve residents currently occupy; and,
  - (iv) the Mining Association of Manitoba Inc. concerning mineral rights; and,



- (v) the Manitoba Metis Federation concerning areas of "historical and traditional access and use-rights of the Metis to land and water"; and,
- (vi) the Manitoba Wildlife Federation concerning many classifications of Crown lands; and,
- (vii) Mr. Roy Barr concerning recreation areas; and,
- (viii) the Thompson Wildlife Association concerning recreation areas; and,
- (ix) the land Entitlement Chiefs Committee concerning lands designated for public purposes, such as parks and wildlife management areas; and,
- (x) the Progressive Party of Manitoba concerning minerals.

- (e) That the existing rights and the interests of current users of Crown lands to be transferred must be honored and protected (and/or that private lands must not be expropriated for entitlement purposes) was the submission of:

- (i) Abitibi -Price Inc.; and,
- (ii) the Mining Association of Manitoba Inc.; and,
- (iii) the Norway House Indian Band; and,
- (iv) the Rolling River Indian Band; and,
- (v) the Norman Regional Development Corporation; and,
- (vi) the Mennonites Central Committee (Canada) and Native Ministries, Conference of Mennonites in Canada; and,
- (vii) the National Stores Department, The Bay,
- (viii) the Land Entitlement Chief Committee.

- (f) That lands to be created as reserve must extend to the ordinary high water mark of (any) lake or river was the submission of:

- (i) the The Pas Indian Band; and,
- (ii) the Mathias Colomb Indian Band; and,
- (iii) the Island Lake Chiefs; and,
- (iv) the Norway House Indian Band; and,
- (v) the Rolling River Indian Band; and,
- (vi) the Manitoba Committee of the Communist Party of Canada; and,
- (vii) the Mennonites Central Committee (Canada) and Native Ministries conference of Mennonites in Canada; and,

- (viii) the Carman Presbytery, the United Church of Canada; and,
  - (ix) the Manitoba Interchurch Coalition on Resource Development; and,
  - (x) the Land Entitlement Chiefs Committee.
- (g) That land ought to be selected for economic development potential, and be Productive lands, suitable for development by Bands was the submission of:
- (a) the Manitoba Interchurch Coalition on Resource Development; and,
  - (b) Mr. Kenneth Emberly; and,
  - (c) the Carman Presbytery, the United Church of Canada; and,
  - (d) the Roseau River Indian Band; and,
  - (e) the Long Plain Indian Band; and,
  - (f) the Rolling River Indian Band; and,
  - (g) Dr. Samuel Corrigan; and,
  - (h) the Mennonite Central Committee (Canada) and Native Ministries Conference of Mennonite in Canada; and,
  - (i) the Manitoba Committee of the Communist Party of Canada,
  - (j) the Land Entitlement Chief Committee.
- (h) That selection of boundaries of a reserve must facilitate uninterrupted road access to and from (private) property adjacent to or within the boundaries of a reserve was the submission of:
- (i) the National Stores Department, The Bay; and,
  - (ii) the Northern Association of Community Councils; and,
  - (iii) the Mining Association of Manitoba Inc.; and,
  - (iv) the Canadian Executive Council of Canada.
- (i) That reserves which will be created ought to be contiguous or near to existing reserves to the extent that may be possible was the submission of:

- (i) the Carman Presbytery, the United Church of Canada; and,
- (ii) the Land Entitlement Chiefs Committee; and,
- (iii) the Norman Regional Development Corporation; and,
- (iv) the Manitoba Cattle Producers Association.

(j) That Federal and/or Provincial monies ought to be used to purchase (some) patented to be set aside as reserves was the submission of:

- (a) the Carman Presbytery, the United Church of Canada; and,
- (b) the Rolling River Indian Band; and,
- (c) the Mennonite Central Committee (Canada) and Native Ministries, Conference of Mennonites in Canada; and,
- (d) the Land Entitlement Chiefs Committee.

(k) That an effective mechanism for implementation of any agreement that may be reached concerning land entitlement must be created was the submission of:

- (i) the Treaty Land Entitlement Chiefs Committee; and,
- (ii) the Long Plain Indian Band; and,
- (iii) the Island Lake Chiefs; and,
- (iv) the Interchurch Coalition on Resource Development in Manitoba, the Interchurch Task Force on Northern Flooding, Native Ministries of the Conference of Mennonites in Canada and Native Concerns of Mennonite Central Committee (Canada).

#### IX. AN HISTORICAL BACKGROUND OF TREATY LAND ENTITLEMENT

A brief summary of the context within which the issue of unfulfilled Treaty land entitlement arises may be some assistance in understanding the issue.

A. THE ROYAL PROCLAMATION OF 1763

1. In 1763 the British King, sovereign of the territory now known as Canada, issued a Royal Proclamation. In that Proclamation the British sovereign recognized an Indian interest in lands occupied by the various Indian tribes. This Proclamation decreed that Indian interest in the lands could only be ceded to, or purchased by, the Crown. It also forbade non-Indians from settling or taking possession of lands occupied by the Indians until such time as the Indian interest was settled in that manner. This Proclamation led to the making of agreements, or treaties as they are called, with the Indians.
2. A terse statement of the historical background appears in a brochure published by the Department of Indian Affairs entitled "Focus on Specific Claims" dated July, 1982. The relevant comment states that:

"As far back as the Royal Proclamation of 1763, the British sovereign recognized an Indian interest in lands occupied by various tribes. This interest in the lands could only be ceded to or purchased by the Crown. This policy led to the tradition of making agreements, or treaties as they were later called, with the Indians.

Following the American War of Independence (1775 -1783), Upper Canada felt the pressures of settlement and many land cession treaties were made with Indians for the surrender of their interest in the land. Initially, these involved one-time cash payments, but in later surrenders the Crown set aside reserves and granted annuities and other considerations.

Thirteen treaties were concluded between the Indians and the government following Confederation. Eleven, the so-called numbered treaties, extend from the Quebec border, covering all of northern Ontario and stretching across the prairies into northeastern British Columbia, southeastern Yukon and the MacKenzie Valley in the Northwest Territories.

Most post-Confederation treaties, in what are now the prairie provinces, were made before the provinces came into being or provincial boundaries were finally determined."

B. The Treaties

1. The Honourable Alexander Morris, P.C., Lieutenant-Governor of Manitoba, the North-West Territory and Kee-wa-tin, was one of the appointed representatives of the Crown charged with the responsibility of negotiating treaties with the Chiefs and other representatives of the many Indian Bands of various tribes who were the occupiers of the lands which were to become the prairie provinces.

2. The Hon. Mr. A. Morris wrote a book titled "The Treaties of Canada with the Indians". In his preface he states:

"The question of the relations of the Dominion of Canada to the Indians of the North-West, is one of great practical importance. The work, of obtaining their good will, by entering into treaties of alliance with them, has now been completed in all the region from Lake Superior to the foot of the Rocky Mountains. As an aid to the other and equally important duty - that of carrying out, in their integrity, the obligations of these treaties, and devising means whereby the Indian populations of the Fertile Belt can be rescued from the hard fate with otherwise awaits them, owing to the speedy destruction of the buffalo, hitherto the principal food supply of the Plain Indians, and that they may be induced to become, by the adoption of agricultural and pastoral pursuits, a self-supporting community - I have prepared this collection of the treaties made with them, and of information, relating to the negotiations, on which these treaties were based, in the hope that I may thereby contribute to the completion of a work, in which I had considerable part, that of, by treaties, securing the good will of the Indian tribes, and by the helpful hand of the Dominion, opening up to them, a future of promise, based upon the foundations of instruction and the many other advantages of civilized life."

3. In relating the circumstances surrounding the negotiations of Treaties 1 and 2, the Honourable Alexander Morris recites the address to the

Indians assembled at the Stone Fort on July 27, 1871 for the purpose of negotiating a mutually acceptable Treaty. That address included the following representations:

"Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so of your own free will. Many of you, however, are already doing this.

I drove yesterday through the village below this Fort. There I saw many well-built houses, and many well-tilled fields with wheat and barley and potatoes growing, and giving promise of plenty for the winter to come. The people who till these fields and live in those houses are men of your own race, and they shew that you can live and prosper and provide like the white man.

What I saw in my drive is enough to prove that even if there was not a buffalo or a fur-bearing animal in the country, you could live and be surrounded with comfort by what you can raise from the soil.

Your Great Mother, therefore, will lay aside for you 'lots' of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.

These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms will be required. They will enable you to earn a living should the chase fail, and should you choose to get your living by tilling, you must not expect to have included in your reserve more of hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers. The old settlers and the settlers that are coming in, must be dealt with on the principles of fairness and justice as well as yourselves. Your Great Mother knows no difference between any of her people. Another thing I want you to think over is this: in laying aside these reserves, and in everything else that the Queen shall do for



you, you must understand that she can do for you no more than she has done for her red children in the East. She will not do less for you because you are all her children alike, and she must treat you all alike.

When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the places where the white man will require to go, at all events for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.....

You will look to the Commissioner to fulfil everything he agrees to do, and the Queen will look to the chiefs you name to use, to see that you keep your parts of the agreement...

It is our wish to deal with you fairly and frankly."(emphasis added)

4. It is evident from these comments and many others that the representations made to induce the Indians to enter a Treaty included a choice to carry on the traditional Indian life-style to "roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate"; and that the reserves to be set aside would consist of "land to be used by you and your children forever".
5. The Manitoba Bands which have outstanding unfulfilled land entitlement or which claim entitlement, are those signatory to Treaties numbered 1, 2, 4, 5, 6, and 10. The dates of each of these treaties are:

Treaty 1 - dated August 3, 1871  
Treaty 2 - dated August 21, 1871  
Treaty 3 - dated September 15, 1874



Treaty 4 - dated September 21, 1874  
Treaty 5 - dated September 20, 1875  
Treaty 6 - dated August 23, 1876  
Treaty 10 - dated August 28, 1906

6. The preamble of Treaties 1, 4 and 5 state the reason that Treaties were negotiated. The following excerpts from the preambles of those Treaties are relevant to understand the basic motivations of the Crown to reach an accord with Indian Bands who inhabited an area:

Treaty No. 1

"Whereas all the Indians inhabiting the said country have pursuant to an appointment made by the said Commissioner, been convened at a meeting at the Stone Fort, otherwise called Lower Fort Garry, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and to the said Indians of the other, and whereas the said Indians have been notified and informed by Her Majesty's said Commissioner that it is the desire of Her Majesty to open up to settlement and immigration a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty and arrangements with them so that there may be peace and good will between them and Her Majesty...."

Treaty No. 4

"And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration, trade and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty ..."

Treaty No. 5

"And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty,..."

7. In each Treaty the Indian party thereto agreed to "hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever to the lands" which are described in the Treaty.
8. In consideration of this absolute cession the Crown represented it would, inter alia, set aside reserves of land for the sole and exclusive use of the Indians, and that "as long as the sun shall shine there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land". The reserves were not intended to be merely a place where the Indian could reside but also were intended to contain land from which they could obtain the means of sustenance and their economic needs, i.e., they were intended to be lands "where you could live and be surrounded with comfort by what you can raise from the soil."
9. It was apparent to the Treaty negotiators that in due course the traditional lifestyle whereby the Indian could rely on hunting and fishing for self- sustenance of himself and his family was approaching an end. The statement by Morris in his preface reproduced above sets forth the grim realities which the Indians were facing as thousands of white European settlers were settling the land and the abundance of wildlife was rapidly diminishing.

10. The alternative presented to the Indians was to provide them with an opportunity to meet their economic needs by tilling the land and adopting the lifestyle of the white settlers by becoming farmers, not amongst the non-Indian population, but on the reserves where the Queen "will not allow the white man to intrude".

11. But this transformation in lifestyle was to occur only if the Indian chose to do so. The Indians were promised that "You need not live like the white man unless you can be persuaded to do so of your own free will."

12. The Indians covenanted in return, in words contained in Treaty No. 5 and other Treaties:

"that they promise and engage that they will, in all respects, obey and abide by the law, and they will maintain peace and good order between each other...and they will not molest the person or property of any inhabitant of such ceded tracts.....or interfere with or trouble any person passing or travelling through the said tracts, or any part thereof....".

And, as already stated, the Indians ceded to the Crown all their rights to the land.

13. The comment in the submission to this Commission by the Mennonite Central Committee (Canada) and the Native Ministries in Canada, that:

"by and large our people have flourished in this province. We recognize, however, that our history as a people in this province was made possible by the Treaties made between Indian peoples and the Canadian Government",

is an acknowledgement of the importance of the Treaties by which the Indians ceded their land. It acknowledges that had the land not been ceded non-Indians could not have acquired a lawful right to settle the land. And it acknowledges that the Indian promise not to molest or

trouble the white settler was of considerable importance in attracting European settlers.

14. The essence of the promises to the Indians was their right to their own areas of land which would be adequate and of a kind that would provide a realistic opportunity to ensure their continued self-sustenance from the soil when their traditional lifestyle could no longer meet their needs.
15. Another important element in the Treaties is that the responsibility for laying aside land as reserves "for the sole and exclusive use of the Indians", in the quantum per capita as set out in each applicable Treaty, lay solely with the Crown. Indeed, it could not be otherwise. The Indian Bands on the prairies had, by Treaty, ceded to the Crown all the tracts of land which each had occupied and hence only the Crown could exercise the necessary authority to set aside land as reserves for the Indians.
16. Until 1930, determining and satisfying the obligations flowing from the Treaties involved only the Indian Bands and the Government of Canada representing the Crown, since they are the only parties to those treaties.

17. It does seem clear that the issue as to whether a Band has an outstanding unfulfilled land entitlement and, if so, the amount of land to which it is entitled, remains a matter to be resolved solely between the Band affected and Canada in accordance with the obligations set out in the applicable treaty, and these are not matters in which the province may, as a matter of right, intervene.
18. Under the terms of the Treaties it is Canada and the Bands, and not the province, which have the duty to select the land which should be transferred back to Canada to hold as reserves of the Indians. And the kind of land that should be selected and set aside as reserves of Indian Bands flows from the Treaties and not the Transfer Resources Agreements between Canada and each of the prairie Provinces.
19. Furthermore, the British North America Act provided by Section 91(24) that "the exclusive Legislative Authority of the Parliament of Canada extends to...Indians and Land Reserved for Indians.....".

C. The Manitoba Natural Resources Transfer Agreement (M.N.R.T.A.)

1. However, during the 1920's the prairie provinces insisted that the Federal Government grant each of them the rights to the natural resources within their respective boundaries, similar to those enjoyed by the original provinces that united to establish the Dominion of Canada in 1867. In December, 1929 the Manitoba and Federal Governments entered into an agreement whereby the "unalienated natural resources within the boundaries of the Province subject to any trust existing in

respect thereof and without prejudice to any interest other than that of the Crown in the same" be transferred to the Province. This agreement was approved by the enactment known as "The Manitoba Natural Resources Act" assented to 30th May, 1930.

2. Sections 11, 12 and 13 pertain to Indian Reserves and the Treaties.

These sections read:

"11. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the Minister of Mines and Natural Resources of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

12. The provisions of paragraphs one to six inclusive and of paragraph eight of the agreement made between the Government of the Dominion of Canada and the Government of the Province of Ontario on the 24th day of March, 1924, which said agreement was confirmed by statute of Canada, fourteen and fifteen George the Fifth chapter forty-eight, shall (except so far as they relate to the Bed of Navigable Waters Act) apply to the lands included in such Indian reserves as may hereafter be set aside under the last preceding clause as if the said agreement had been made between the parties hereto, and the provisions of the said paragraphs shall likewise apply to the lands included in the reserves heretofore selected and surveyed, except that neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administerable by or be paid to the Province.

13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."



X. CONSTRUCTION OF THE MANITOBA NATURAL RESOURCES TRANSFER AGREEMENT

1. Clause 11 of the Manitoba Natural Resources Transfer Act states "...the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the Minister of Mines and Natural Resources of the province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the province...".
2. It will be noted that Section 11 of that agreement provides, inter alia, that:
  - a) Manitoba and Canada agree that out of the Crown land that was unoccupied and transferred to provincial administration in 1930, lands will be made available to enable Canada to fulfil its obligations under the treaties; and,
  - b) Canada (through its Superintendent General of Indian Affairs, now known as the Minister of Indian Affairs and Northern Development) has the responsibility to make the request for land from the province, as well as the responsibility to select the lands necessary to fulfil its obligations; and,
  - c) the selection of the land by Canada is to be in agreement with the Province through its Minister of Mines and Natural Resources; and,



d) when the lands have been transferred to Canada for sole and exclusive use as Indian reserve land it is to be administered by Canada in all respects as if such areas of land had never been transferred to Manitoba.

3. It is apparent that it was agreed the duty to fulfil the Treaty obligations continues, as it has always been, to be Canada's responsibility, but that Canada agreed that the land shall be selected in agreement with the province. This part of the agreement appears to bring about a curious result. The Treaties require Canada to set aside land as reserves consisting of a certain number of acres per capita in each Band as set out in the applicable Treaty, in a location as may be acceptable to the Indian Bands affected. However, the Natural Resources Transfer Agreement contemplates that the Province shall agree to transfer the land selected. Does this provision give the province a veto power over which land out of the Crown lands which were unoccupied and transferred in 1930 may be selected as reserve land to enable Canada to fulfil its obligations? I doubt that. I think the Province does not have the power to do anything under Section 11 of the Transfer Act that will disable Canada from carrying out its obligations under the Treaties, including the Treaty responsibility of Canada to jointly select the location of the reserve with the Band.

4. Canada could not avoid its obligation to the Indians under the treaties by unilaterally entering into an agreement with the Province which would disable it from fulfilling its treaty obligations. Section 11 ought

therefore to be interpreted as imposing a duty on the Province, in consideration of the transfer of the unalienated natural resources to it, to do what is necessary to enable Canada to fulfill its treaty obligations. This latter interpretation is preferable since it is a rule of construction of statutes that if the words permit an interpretation which will avoid an injustice such construction is to be preferred.

5. Canada's obligations under the Treaties, as they affect land entitlement due to Indian Bands, include the obligations to:
  - a) select, with the approval of the Band, the location of the land to be set aside as Indian reserve land, from the area of land ceded by the applicable Treaty.
  - b) provide reserve land of a quality that would provide the Band membership with the opportunity to derive a living from it, ie., land which will enhance the socio-economic well-being of the membership.
  - c) provide the amount of land entitlement as stated in each prairie Treaty (ie. either 160 acres or 640 acres per family of five or in that proportion per member of a Band).
6. The Treaties are silent as to the date on which the membership of a Band is to be counted, but Canada's interpretation of its Treaty obligation

has been that the amount of entitlement shall be based on the membership count as at the date the land is selected or surveyed following selection.

7. The responsibility of the province under the Manitoba Natural Resources Transfer Agreement is to make such amount and quality of land available as may be necessary to enable Canada to fulfil its obligations under the Treaties. But this responsibility extends only to land which was unoccupied Crown land transferred to Manitoba in 1930, and provided such land is within the area ceded by the Band to which the further land entitlement is now remaining due.
8. This may create a problem. The amount of unoccupied Crown land that was transferred to Manitoba in 1930 within a Treaty area, when determined, may be found to be insufficient to meet the amount of land entitlement agreed to be due in 1983 to the Bands within that Treaty area. Even the amount of such land that is available may lack the quality contemplated by the Treaties. This problem is likely to arise in relation to fulfilling the land entitlement due to Bands in the areas to which Treaties, 1, 2, 4 and 6 are applicable.
9. In these circumstances the obligations to the Indians under the Treaties will remain to be fulfilled by Canada because the province is limited in its responsibilities to the extent that the amount and quality of land necessary to fulfil Treaty obligations is unavailable out of the unoccupied Crown land transferred to Manitoba in 1930. Canada will have to purchase land to fulfil its obligations to the Indian Bands so affected.

10. The funding of a purchase policy to obtain suitable lands to meet the land entitlement obligations will need to be addressed for additional reasons, and will therefore be dealt with later in this report.
11. Other aspects that must be addressed in construing Section 11 of the Manitoba Natural Resources Transfer Agreement are to determine in which matters the province may have a proper concern, in order to satisfy itself that the land Canada has selected, with the approval of the Band, "is necessary to enable Canada to fulfil its obligations under the treaties". I use the words "with the approval of the Band" because the Treaties contemplate that the lands selected must be of a quality and in a location acceptable to the Band provided only that such land is within the land ceded by the applicable Treaty and in an amount contemplated by the Treaty as represented to the Indians during the Treaty negotiations.
12. In the opinion of the Commission the responsibility to fulfil the Treaty obligations to the Bands is and always has been that of the Federal Crown and not the province. The province may however have a right of review to satisfy itself that these obligations, as determined by Canada and the Band, are not inconsistent with a reasonable interpretation of the applicable Treaty.
13. That is the authority or power given to the province by the phrase "(Canada) may, in agreement with the Minister of Mines and Natural Resources of the province, select (lands) as necessary....". I think that the agreement required from the province is merely that already

stated viz, that the amount and quality of the land selected is not inconsistent with the obligations contemplated by the Treaty as represented during the Treaty negotiations. It does not mean that the right and duty of Canada and the Bands affected to settle the amount, quality and location of the land is not solely their responsibility. It does not give the province the power to veto their decision as the obligations that flow from the Treaty, unless it is a patently unreasonable interpretation of their obligations.

14. It would be unjust to consider that those words in Section 11 of the Manitoba Natural Resources Transfer Agreement are to be interpreted as conferring on a province the power or authority to frustrate Canada from being able to meet its Treaty obligations to the Indian Bands. On the contrary, it is my view that these words are to be interpreted as imposing an obligation on the province to do whatever is necessary to enable Canada to fulfil its Treaty land obligations to Indians as Canada and the Indian Bands may agree, until these obligations are fully carried out.

15. In the case of Town of Hay River vs. The Queen (1979), 101 D.L.R. (3d) 184, Mahoney J. of the Federal Court observed that

"It is not necessary, for this purpose, to attempt a comprehensive definition of the legal nature of Treaty No. 1. Clearly, it is not a concurrent executive act of two or more Sovereign States. Neither, however, is it simply a contract between those who actually subscribed to it. It does impose and confer continuing obligations and rights on the successors of the Indians who entered into it, provided those successors are themselves Indians, as well as on Her Majesty in right of Canada. It confers no rights on strangers to the Treaty such as the plaintiff."

In my opinion a Province is no less a stranger to the continuing obligations under the Treaties than a municipality.

16. In the Hay River case the municipality submitted that the Treaty contemplated that the locality of the land must be found suitable and open for selection and contended that the land selected was not suitable because, inter alia:

1. they were within an established municipality;
2. they were already occupied by "numerous non-band members";
3. they are "not contiguous but contain large parcels of privately owned land";
4. they are not intended to be used by the band for settlement but rather the band intends to derive revenue from leasing them;
5. they are intended to be used for harbours and public works "which should not form part of the reserve." (1980 C.N.L.R. p. 24).

Mahoney J. commented on this issue, saying :

"(t)he pertinent provision of the Treaty requires that the location selected be suitable to the Indians and to Her Majesty. If its suitability to either can be brought into issue by a municipality within whose limits the lands lie, which I doubt, the duty of one or the other to take the municipality's interest into account would have to be based on a far more substantial real municipal interest in the lands than is established here." (1980 C.N.L.R. p.24)

The court appears to underline the fact that the nature and location of land selected is a matter which the Treaty contemplates shall be resolved between the Band and Canada and that to succeed on the matters into issue a municipality must have a much more substantial interest than is disclosed by the aforementioned five matters.

17. Whether the same principle would apply to a province has not been judicially decided. What is certain is that Canada considers that the issue as to whether or not a Band has an unfulfilled land entitlement is not an issue in which a province has any right to intervene. In a letter from the Hon. J.C. Munro to the Hon. J. Gary Lane of Saskatchewan dated November 25, 1982, the Minister states:

"Validation of a claim and determination of what the outstanding federal obligation under the terms of a treaty is a federal responsibility. The validation of the first twenty-one treaty land entitlement claims resulted from research compiled and verified by a working committee composed of representatives of the Federation of Saskatchewan Indians and this Department."

18. The nature and extent of these treaty obligations and the manner in which they shall be met arise out of the Treaty negotiations and the signed Treaties, and may be gleaned from the conduct of the parties to these Treaties. It is solely Canada and the Indians that must reach mutually acceptable agreements as to the settlement which will constitute fulfilment of treaty obligations, since the province is not a party to any treaty. I think that Canada's position on this issue is unassailable and that Section 11 does not derogate from Federal authority in this area.

19. Recommendation

On the basis of the foregoing analysis, I recommend that the authorized representatives of Governments of Canada and Manitoba should forthwith meet with the authorized representatives of the Bands whose unfulfilled



land entitlement claims have been "validated" by Canada and those Bands whose claims are still being reviewed by Canada and/or may hereafter be "validated" by Canada. All these Bands have established a Land Entitlement Chiefs Committee whose chairman is Chief Jim Bear of the Brokenhead Reserve. The purpose of  meeting ought to include, inter alia, the making of every reasonable effort to conclude a mutually acceptable agreement in writing that will contain the major terms and conditions to be implemented by each of the parties in order to settle, with finality, each and every outstanding unfulfilled land entitlement due to each Band. Such agreement ought also to contain an enforceable mechanism for implementation of all provisions in the agreement as expeditiously as practical.

XI. A REVIEW OF MATTERS CONCERNING DETERMINATION OF QUANTUM OF ENTITLEMENT  
OF A BAND

A. THE POSITIONS THAT WERE TAKEN BY THE GOVERNMENTS DURING NEGOTIATIONS OF  
THE MNRTA

1. One of the major issues that must be addressed once Canada has validated an outstanding land entitlement due to a Band, is the amount of land that is due and owing to each Band, since "validation" of entitlement by Canada appears to be akin to saying; "yes, there is a debt due from

Canada to the Band by reason of the obligations to Indians under the treaties but the amount of this debt remains to be determined by negotiation."

2. Canada agreed to transfer to the Province the unalienated natural resources within the boundaries of Manitoba as set out in the "Memorandum of Agreement Made this fourteenth day of December, 1929". That Agreement (the Manitoba Natural Resources Transfer Agreement) includes the paragraph stating that:

"...the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province...shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trust existing in respect thereof, and to any interest other than that of the Crown in the same..."  
(emphasis added).

The provisions in the Agreement which provided "otherwise" included Sections 11, 12 and 13, which were reproduced earlier herein. These sections deal with "Indian Reserves". Whether or not these provisions were set out in the Agreement by reasons of a "trust existing in respect thereof" or as an "interest other than that of the Crown", hardly matters. The fact is that Canada by Section 11 gave notice to Manitoba that there existed as at 1929 some outstanding land entitlement due to the Indians and that the Province will be duty bound to make available to Canada such lands as Canada may "select as necessary to enable Canada to fulfil its obligations under the Treaties with the Indians of the Province..."; and Canada gave notice that the selection would be made out of the "unoccupied Crown lands hereby transferred" to Manitoba in 1930 (emphasis added).

3. I think Section 11 was not only notice to Manitoba that Canada had outstanding obligations to select and set aside more land as Indian Reserve land, ie., notice of a debt due to Indian Bands, but this section is analogous to Manitoba and Canada agreeing to place a caveat on the Crown land in Manitoba which was then unoccupied and transferred to Provincial administration by that Agreement.
4. Indeed, the following excerpts from correspondence establishes that these treaty land obligations were addressed and dealt with by the representatives of Canada and Manitoba during the negotiations for the Manitoba Natural Resources Transfer Agreement, viz.,
  - a) Letter of Duncan C. Scott (Deputy Superintendent General of the Department of Indian Affairs) to W. Stuart Edwards (Deputy Minister of Justice) dated November 23, 1928. (Appendix "J")
  - b) Letter of Oliver Master, Sec'y to the Royal commission on the Transfer of Manitoba's Natural Resources to the said Duncan C. Scott dated 6th March, 1929. (Appendix "U")
  - c) Letter of J. Chisholm, Acting Deputy Minister of Justice, to Duncan C. Scott dated August 28, 1929. (Appendix "V")
  - d) Letter of Duncan C. Scott of to Deputy Minister of Justice dated September 4, 1929. (Appendix "W")

- e) Letter of the Acting Deputy Minister of Justice to the Deputy Superintendent General of Indian Affairs dated September 6, 1929. (Appendix "X")
- f) Letter of the Deputy Minister of Interior to Duncan C. Scott dated 7 October, 1929. (Appendix "Y")

5. Those letters inform the reader that:

- a) "There are some Indians in Manitoba not yet provided with land and others have not received their full quota." (see Appendix "T")
- b) "Copies of your (Canada's Dept. of Indian Affairs) letter (ie. Appendix "T") have been sent to Counsel for the Province of Manitoba as well as counsel for the Government of Canada so that they may be fully aware of this particular situation with respect to Indian claims." (see Appendix "U")
- c) "...(but) the Province of Manitoba desires to stipulate some limitation in respect of the areas of land to be selected in fulfilment of Treaty obligations with the Indians, approximately in accordance with the letter from you which was filed with the Royal Commission..." (emphasis added) (see Appendix "V")
- d) "I note the request of the Province of Manitoba to have the Agreement stipulate some limitation in respect of the areas of land to be selected in fulfilment of treaty obligations with the Indians. The various treaties provide for so many acres per capita and the practice of the Department has been to take the census of the band at the time that the survey of the required acreage is made. The acreage as hereinafter stated will be varied at the time of survey to meet the decrease or increase of the membership at such time. I do not think accordingly that it would be proper to insert any limitation of acres in the Agreement. When these surveys come to be made the Department will be able to satisfy the Province of Manitoba as to our strict adherence to treaty conditions...." (emphasis added) (see Appendix "W")
- e) "That it would not be advisable to insert in the agreement any limitation in respect of the areas of land to be selected in fulfilment of treaty obligations with the Indians because the acreage will be varied at the time of survey to meet the increase or decrease of the membership at such time." (emphasis added) (see Appendix "X")

- f) "The clauses relative to Indians in the Agreement with Manitoba correspond to clauses 8 and 9 of the Alberta Agreement and, it is understood, are satisfactory to you as they stand." (see Appendix "Y")
6. The position of Canada was clearly to reject any limitations of acreage in the agreement as requested by Manitoba because "the strict adherence to Treaty conditions" imposed on Canada the obligation to set aside such amount of acreage as will "at the time of survey.....meet the decrease or increase of the membership at such time." (emphasis added).
7. Furthermore, this view of Canada's obligation under the Treaties is consistent with the views and representations made to the Indians during negotiations for the Treaties as reported by the Hon. Alexander Morris in his book "The Treaties of Canada with the Indians" (1880), referred to earlier in this report.

B THE POSITION THAT HAS BEEN TAKEN RECENTLY BY THE FEDERAL GOVERNMENT

1. As late as 1966 Mr. H.T. Vergette, Head, Land Surveys and Titles Section of Indian Affairs, informed Mr. R.M. Connelly, then Regional Director of Indian Agencies in Manitoba, by letter dated December 27, 1966, (Appendix "Z") inter alia, that,

"We are now in a position to discuss the entitlement to land under the terms of Treaty 5 of the Island Lake Band of Indians.

The subject of treaty entitlement to land has been a matter of concern to both the Department and the Indians for a number of years. The most difficult problem we face is to determine the exact areas of land to which bands with unfulfilled credits are entitled. Where partial entitlement has been met, the calculations become increasingly difficult.

To date, there has been no firm statement of policy as regards satisfying land entitlement under the terms of the various treaties. We have examined correspondence on file at Headquarters and have been able to identify a number of precedents and principles, which have governed negotiations with Provincial Governments over the years. Simply stated, these are as follows:

- (1) Provinces have an obligation under the terms of the National Resources Transfer Agreement to provide free grants of unoccupied Crown land to enable the Federal Government to fulfill its obligations under the terms of the treaty.
- (2) \*Acreage is calculated on the basis of band population at the time the reserves are selected. Where a band has received some of its entitlement, the area is reduced by the acreage already received." (emphasis added).

2. In that letter Mr. Vergette advised further that:

"The Legal Advisor reviewed this matter in 1954 and stated that there did not appear to be any possible way to give a firm legal opinion as to the right of the Federal Crown to arbitrarily set the selection date for purposes of determining the acreage of reserve areas. However, the established practice has been for the Provinces to grant out of unoccupied Crown Lands such further areas as the Superintendent General may, in agreement with the appropriate Provincial Minister, select as necessary to enable Canada to fulfill its obligations under the terms of the treaties with the Indians. The acreage, as previously stated, has been based on the band population at the time of selection.

An argument in support of this principle of selection is that the Indians have not derived any benefit from the lands to which they were entitled since the signing of the relevant Treaty. Whereas in many cases bands which took their full credits have built up substantial trust funds.

At the time of the signing of Treaties, some of the Indians were adverse to being placed on reserves and were satisfied with the promise that these lands would be granted when required. This seems to confirm the view that the establishment of reserves was to take place at some time in the future and should be based on the population at the time of selection.

With the developments taking place in northern Canada it is most important that we move quickly to liquidate all outstanding land credits. If we do not, it may well be that good lands will not be available or there will be an increasing resistance to our demands for additional land. However, Provinces may be unwilling to follow the established precedents or challenge the acreages requested by the Department. These precedents have been heavily in favour of the Indians and I am sure that you will agree that



any change in the Provincial position which would result in inequitable treatment would be most undesirable.

In the past, the provinces have consistently accepted the population statistics provided by the Department. These have been obtained from Treaty Paylists or Census Reports, depending on which source was most beneficial to the Indian band concerned." (emphasis added).

3. And he also advised that:

"We hold a position of advantage in negotiations with the Provinces as we possess the only reasonably accurate record of band organization and development. The Provinces have invariably looked to us to provide the information as to band population and have accepted it without question."

As a first step, I suggest that a band by band review of land entitlement be made and reports be obtained from Agencies prepared along the lines of the attached specimen for the Island Lake Band. These reports can then be forwarded to Ottawa for verification and a firm figure arrived at that would be the basis obtained with the Province as to the amount of land to be granted to a particular band in satisfaction of its land entitlement; action can be taken to have the bands select the areas desired. It is customary after selection to arrange for a temporary reservation of the lands pending a formal application by the Minister. Legal surveys and conveyances by Manitoba to Canada would follow in due course.

The Island Lake Band entered Treaty 5 by an adhesion signed on July 29, 1909. As you will note from the enclosed schedule in 1924 this Band selected two tracts of land which was less than their entitlement at that time by some 2,939 acres. These two tracts of land totalling 17,829 acres were later confirmed as the Island Lake Reserves 22 and 22A. Based on the present day population of 2,295 and the precedent established with other provinces they would now be entitled to an additional 58,811 acres.

It may be appropriate at this time for you to initiate negotiations with Manitoba to obtain agreement on the basic terms by which all outstanding land credits for bands in Manitoba will be liquidated. If you feel that a formal approach by the Minister to open those negotiations would be preferable, this will be arranged. Please let me have your views on this aspect.

You should not inform the Island Lake Band about the acreage we have calculated as outstanding until negotiations with the Province on the basic terms of settlement have been concluded...."(emphasis added)

4. In summary, it is clear that the method used to calculate the amount of land entitlement due to a Band based on "a number of precedents and



principles" was that "The acreage, as previously stated, has been based on the population at the time of selection." In other words, historically the amount of land entitlement, in Canada's view of its Treaty obligations, was to be determined on the basis of band population at the time of last survey or last selection less the acreage already received. This position was based on the "precedents and principles" established by Canada in determining its Treaty obligations.

5. This view of Canada's Treaty obligations, as at December 27, 1966, confirms the position enunciated by Dr. Duncan C. Scott in his letter of September 4, 1929 to the Deputy Minister of Justice (Canada). viz. "The acreage as hereinafter stated will be valued at the time of survey to meet the decrease or increase of the membership's at such times." Canada, by refusing to agree to Manitoba's request to include in the Resources Transfer Agreement any mention of any limitation in acreage remaining due to a Band, clearly adopted the views of its Deputy Ministers, and Manitoba accepted the agreement which makes no mention of any limitation.

6. The Department of Indian and Northern Affairs (Canada), in a letter to the Commission dated November 5, 1982, (Appendix AA) advises in part:

"In 1975, the Minister of Indian Affairs invited the Premiers of the three prairie provinces to cooperate in finally settling all outstanding entitlement.

Saskatchewan. In 1976, Saskatchewan responded with a proposal it had negotiated with the Federation of Saskatchewan Indians. The main elements were as follows:

- The land quantum for validated claims was to be calculated using the band's population as of December 31, 1976.

- The Province was prepared to meet all reasonable requests for land in northern Saskatchewan.
- The federal and provincial governments would both make available for selection their occupied and unoccupied lands in southern Saskatchewan. Final selections were subject to the Province being able to satisfy third parties.
- The Province would consider band requests to exchange land for revenue sharing and other joint ventures.

In March 1977, the Federal Cabinet generally concurred in Saskatchewan's proposal, and authorized the Minister to conclude an agreement with the Province on that basis. This was never realized because the Province was of the opinion that the 1976/77 exchange of correspondence between governments was a sufficient basis for proceeding. In 1978, the Minister of Indian Affairs agreed to proceed on an adhoc basis, without the benefit of a formal agreement outlining each party's role and responsibilities.

Considerable progress has been made in settling treaty land entitlements on the basis of the 1976/77 Agreement. Since 1977 discussions and negotiations between the Federation of Saskatchewan Indians and the two governments have resulted in the validation of 21 claims representing 1,069,140 acres of land under the Saskatchewan Formula. To date, the 21 bands involved have selected 794,672 acres, or 74% of their entitlement. A total of 58,494 acres, or 6%, has been transferred already to reserve status and additional 41,315 acres, or 4%, are in the process of being transferred. In addition, 249,413 acres, or 24%, have been committed by Saskatchewan and Canada pending satisfactory negotiations with third parties presently occupying the Crown lands. The 21 bands have approximately 274,468 acres, or 26% of their entitlement remaining to be selected." (emphasis added).

7. In 1977, the Minister of Indian Affairs, the Hon. Warren Allmand wrote letters to the Premiers of Manitoba and Alberta, urging each of them to address the settlement of unfulfilled land entitlement to enable Canada to fulfil its Treaty obligations. The letter to Premier Edward Schreyer dated July 13, 1977 (Appendix BB) contains the following views:

"At this time, I would suggest that an excellent opportunity has presented itself for resuming the work which was begun over two years ago. As you may be aware, an offer was recently put forward for the consideration of the Federal Government by the Province of Saskatchewan respecting the settlement of outstanding land

entitlement pursuant to treaty. Resulting from the appointment of the Honourable Ted Bowerman, Minister of the Department of Northern Saskatchewan, as Minister responsible pursuant to Section 11 of the Resources Transfer Agreement, the proposal puts forward a formula for settlement which uses present population figures for a Band with an outstanding entitlement, times the per capita acreage as set out in the applicable treaty. In cases where Bands have received some land, the area already allocated is subtracted from the above total. In Saskatchewan, the population figure has been fixed as of December 31, 1976; beyond that date entitlement will not grow.

The above proposal has been accepted by the Federal Government as a basis for negotiation with the Province and the Federation of Saskatchewan Indians and it is my hope that it could serve as a basis for discussion with a view to reaching a satisfactory settlement in Manitoba." (emphasis added).

8. The letter from the Hon. Warren Allmand to Hon. Lou Hyndman, Minister of Federal and Intergovernmental Affairs, Province of Alberta, dated June 23, 1977 (Appendix CC) states:

"Prior to commenting specifically on the position set out in your letter, I should like to outline for you my government's views respecting the fulfillment of outstanding land entitlements. As you may know, it is our stated policy to fulfil our obligations flowing from Indian legislation and historical treaties with the Indian people. In so doing, we are also aware of the important role which the meeting of outstanding obligations can play in guaranteeing the future socio-economic viability of the Indian people within the larger Canadian society.

However, in meeting our responsibility to provide Indian bands in Alberta, Saskatchewan and Manitoba with their land entitlement pursuant to treaties, the federal government is bound by the Natural Resources Transfer Acts which require agreement between a designated provincial Minister and myself as to the selection of lands. In undertaking such action, I would hope that we could meet the concerns of all parties involved, particularly those of the Indian people.

In this context, I would refer you to the proposal recently put forward to the Federal Government by the Province of Saskatchewan respecting the settlement of outstanding land entitlement pursuant to treaty. Arrived at in consultation with the Federation of Saskatchewan Indians, the Saskatchewan proposal puts forward a formula for calculating outstanding entitlement utilizing present population figures for a Band affected, times the per capita acreage as set out in the applicable treaty. In cases where Bands have received some land, the area already allocated is subtracted from the above total. In Saskatchewan the population figure has been fixed as of December 31, 1976; beyond that date entitlement will not grow.

My cabinet colleagues and I have been encouraged by the Saskatchewan proposal and were pleased to approve it. In our view it provides a basis for finally resolving the remaining obligations to provide land under treaty in a way that meets the needs of Indian Bands concerned. In light of the Saskatchewan proposal we would like to discuss with you the possibility of reaching a settlement of all outstanding treaty land entitlements in Alberta. In suggesting such exploratory discussions with your government, I am not unmindful of settlements made in 1960 with two Alberta bands on the same basis as that currently put forward by Saskatchewan. Specifically, I refer to settlements for the Little Red River and Slaves of the Upper Hay Bands. It is my understanding that the outstanding entitlement of these groups was calculated by utilizing the contemporary population of 1955; this was the date that agreement was reached between Alberta and Canada concerning the provision of land for these groups.

In view of the above, your letter of April 27 has caused me considerable concern. Firstly, I find untenable your government's stated intention to fix treaty entitlements on the basis of band population at the time of treaty. I would suggest that such a position is excessively restrictive and overlooks entirely the benefits to be gained from providing Indian citizens of Alberta with a land base commensurate with their needs.

Secondly, it has always been understood that upon transfer of lands to Canada for Indian reserve purposes, mines and minerals and other subsurface rights would be and have been included in the transfer. The Natural Resources Transfer Act does not derogate from this position, for it states that all lands conveyed under Section 10 "shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof". You will also note that Section 11, incorporating by reference certain provisions of a 1924 Indian Lands Agreement between Canada and Ontario, deals with the disposition by Canada of moneys derived from mineral developments on Indian reserves. This section could have no effect where the mines and minerals not included in lands returned to Canada for Indian reserve purposes...." (emphasis added).

9. On November 16, 1982 the Hon. John C. Munro held an informal news conference in Ottawa. A transcript of the Minister's comments on that date was made available to the Commission and is attached as Appendix "DD".
10. During this news conference the Minister made some comments that are relevant to this discussion, particularly the following:

"The Saskatchewan formula is one that is considered very progressive, as you know, and one that the FSI negotiated, and one we endorsed in that particular province. But it's different formula in different provinces. That'll be part of the negotiations now that these claims have been validated.

Q. What is your position on that going to be?

Well, I think our position has been made known. We have let Mr. Mitchell know just exactly what our policy on Specific Claims is and brought out that document that you saw fairly recently, so he is aware that we want to keep our commitment to the Indian people, to fulfil these. He is certainly aware of everything we have done in other provinces and he is aware of our endorsement of the so-called Saskatchewan formula. So we would not have endorsed that, if we didn't think it was fair.

...But based on what I've been told of these hearings and my officials have advised me and others that the hearings which Mr. Mitchell has been having, having representations from various church groups, industry, and so on, which are in a non-native area, and the general feeling is that justice should be done, a deal's a deal, these treaties were a deal, that they're unfulfilled treaty land entitlements. There's an obligation to legally, and morally, to rectify the situation. So the public mood is one that's constructive. Might I say that the five (six-ed) principles, that the Indian community established as the basis of their feelings on treaty land entitlement, are pretty reasonable, we think.

As far as Manitoba is concerned, it's my same answer. I think our position, initially is that they have an obligation under the Transfer Act to give us quality land, quality Crown land, and the Indians are aware of that, that we expect them to do so. Now, if they want to put up some other propositions to substitute for that, that's something that we're obviously prepared to discuss." (emphasis added).

#### C. AN ANALYSIS OF POSITIONS TAKEN BY GOVERNMENTS ON QUANTUM OF LAND ENTITLEMENT

1. The Minister alludes to the principles proposed by "the Indian community" as being "pretty reasonable, we think". Those principles include the proposal that the amount of land entitlement be based on "the current band population less the amount of land already received by



the Band affected..". In plain words the Manitoba Entitlement Bands are seeking the adoption in Manitoba of the principle of the "Saskatchewan Formula" agreed to in 1977. They see no reason for accepting a formula that provides less land, particularly since Canada describes the Saskatchewan formula as one which "it would not have endorsed if we didn't think it was fair", and as being "pretty reasonable".

2. Why would any one expect any person to agree to accept a settlement that is less than "fair" and "reasonable"?
3. Furthermore, the Minister the Hon. John C. Munro, in his letter to the Hon. J. Gary Lane, the present Saskatchewan Minister of Intergovernmental Affairs dated November 25, 1982, (Appendix M) states in part that:

"The province's offer in 1976 to use the then-current population in the land quantum calculations was based upon a long standing historical practice to fulfill treaty entitlement on that basis, and a desire to resolve the treaty land entitlement claims in a fair and equitable manner." (emphasis added).

4. However, the Federal Office of Native Claims (O.N.C.) appears to take the position that the Saskatchewan formula is beyond Canada's interpretation of its "lawful obligation" (see Appendix EE) under the numbered treaties, while, at the same time, the Minister of Indian Affairs describes the Saskatchewan formula as "fair", "equitable" and "reasonable". One may be compelled to conclude that the Office of Native Claims' interpretation of Canada's "lawful obligation" is unfair and unreasonable. That is an unavoidable conclusion in view of Canada's admission that the use of the "then-current population in the

land quantum calculations was based upon a long standing historical practice to fulfill.....the treaty land entitlement claims in a fair and equitable manner". (See Appendix "M") (emphasis added)

5. In an undated letter from the Office of Native Claims of the Department of Indian Affairs to the Commission (received December 15, 1982) which is attached hereto as Appendix "EE", the following rationale appears:

"Our legal advisors in the Department of Justice suggest that, although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations, the most reasonable date is probably no later than the date of first survey." (emphasis added).

To put it mildly, there is an air of unreality in submitting this sentence as authority for Canada's view of its "lawful obligations" under the treaties. It lacks any persuasive reasoning, let alone authority for a legal opinion. Only the premise is factual, namely, that the treaties do not explicitly identify the date for which a Band's population base is to be determined for the land quantum calculations. Indeed in the letter from Mr. H.T. Vergette to R.M. Connelly dated December 27, 1966 the following comment appears:

"The Legal Advisor reviewed this matter in 1954 and stated that there did not appear to be any possible way to give a firm legal opinion as to the right of the Federal Crown to arbitrarily set the selection date for purposes of determining the acreage of reserve areas."

That seems to be a reasonable statement, since there were two parties to the Treaty and both must be involved in determining the nature and extent of outstanding obligations pursuant to it.

8. It seems to me that the latter "legal" opinion has greater validity.



9. There is no regard by the O.N.C. to the Minister's view that the "then-current population of a Band" is the base for determining the quantum of land entitlement, and that this is based upon "a long standing historical practice to fulfil treaty entitlement.... and a desire to resolve treaty land entitlement claims in a fair and equitable manner."
10. Federal officials appear to be relying on two policies, viz., one of the Minister reflecting the Government's policy, and one of the Office of Native Claims which alleges that Canada "has a responsibility to support the best interests of the Indian people." (See Appendix EE)
11. The Office of Native Claims, by its words and conduct, is acting actively against the interests of the Indians in their efforts to arrive at a mutually acceptable agreement. The Office of Native Claims is acting inconsistent with the Canadian Government policy and the expressed position of its present Minister and the Ministers who preceded the Hon. J.C. Munro, namely the Hon. Hugh Faulkner and the Hon. Warren Allmand. This is a harsh comment, but the facts presented to this Commission do not permit any other conclusion. One wishes it were otherwise.
12. What position may Canada take during negotiations to resolve land entitlement, in order to carry out its "responsibility to support the best interests of the Indian people"? Until 1977 it took the position

with rare, if any exceptions, that the "then current band population" shall be the base for determining the amount of unfulfilled land entitlement. Canada refused to agree to any alteration in that position during the negotiation in 1929 for the Resources Transfer Agreement, and Manitoba entered the agreement without inclusion therein of any limitation on the amount of acreage due, knowing that Canada's position was that current band population data will be applied "at the time that the survey of the required acreage is made". (see Appendix "W", p.2). Canada reiterated that position in December 1966 and again by endorsing and approving the Saskatchewan formula as one that is fair and equitable. Is it consistent with Canada's "responsibility to support the best interests of the Indian people" (supra) now to take the position that Canada may unilaterally redefine its obligations flowing from the Treaties in order that Indians get less land and thereby reduce the opportunity for Indian bands to attain greater socio-economic self-sufficiency? Canada, and not the Office of Native Claims, must answer that question, and the Commission hopes the O.N.C. will, during negotiations, follow the Federal Ministers' position and thereby facilitate the conclusion of a mutually acceptable agreement.

13. It is preferable for all concerned to make every reasonable effort to reach a mutually acceptable agreement to settle land entitlement once and for all. Hence it is advisable that the Indian Bands reach agreement on all foreseeable issues related to the final settlement of land entitlement with both the Federal and Provincial governments.

D. SUBMISSIONS TO THIS COMMISSION CONCERNING DETERMINATION OF LANDS

1. What were the views expressed on this issue by those who filed submissions with the Commission? Only five organizations filed submissions on this issue.

2. The Mining Association of Manitoba Inc. expressed the view that:

"The question of which Indian Bands are entitled to receive land entitlements under Treaty, and the amount of land to which they are entitled is of course a matter to be settled between the Bands and the Federal Government, for the treaties are a Federal obligation."

3. The Mennonite Central Committee (Canada) and Native Mennonite Conference of Mennonites in Canada, submitted:

"Mr. Commissioner, when we examine the Treaties, on the basis of our principles of justice and fairness, we have no difficulty concluding that these Treaties were made under duress, and that the terms of the Treaties were extremely culturally insensitive, were very one-sided, and were completely unfair to the Indian people. Our concept of justice would require a comprehensive renegotiation of the Treaties, and the provision of enough of a land base to the Indian people that would provide economic viability for the size of the current and future Indian population."

However, we are aware that the Indian people of Manitoba are not asking for this. They are asking only that the terms of the Treaties as made be respected. Thus, we feel it is not appropriate for us to be advocating more than this. What the Indian people are asking for is, however, only the barest minimum of justice and honourable dealing.

It is in this context that we urge that the terms of the Treaties be kept, fully, justly and honourably.

Mr. Commissioner, we wish to make several comments favouring a prompt and thorough settlement of the outstanding Treaty land entitlements:

1. Treaty Obligations: Treaties made should be Treaties kept. That simple statement, it seems, in the Canadian context, needs to

be asserted here and there. For two sovereign bodies to enter into Treaties is to establish a covenant of agreement. Hence, the formalizing of the Treaties with Indians in the last century and early part of this century must be regarded by our separate nations as covenants that must be honoured and cannot be unilaterally altered or broken by either party. As participants in the governmental process by virtue of our citizenship, we are anxious that these Treaties be honoured and any outstanding issues be settled in an equitable manner. It is the settlement of Treaty land entitlements that we wish to address at this particular time in history. We urge that outstanding land entitlements in Manitoba pertaining to Treaties 1, 2, 3, 4, 6, and 10 be concretely addressed and promptly implemented.

2. Criteria for Settlement: Our organizations endorse the six principles for settlement brought forward by the Chiefs' Land Entitlement Committee as the basis for negotiation...

Mr. Commissioner, we have been very impressed with the thorough research undertaken by the T.A.R.R. group, and recognize that these are consistent with the conditions set out in the actual Treaties, and have a historic precedence in the Agreement of 1977 concerning the unfulfilled Treaty land entitlements in the Province of Saskatchewan. We urge that this province respect the precedence set in Saskatchewan in order to avoid dispute over variations in settlement of claims.

Our anxiety is over the possibility that each province might settle very differently thus creating a new source of fractioning among the Indian peoples."(emphasis added)

4. The Manitoba Inter-Church Coalition on Resource Development submitted that:

"The Coalition acknowledges the time and commitment that T.A.R.R. - the Treaty and Aboriginal Rights Research group, has given to preparing for this Commission. We hope that the Commissioner will hear carefully what they have to say. The Coalition supports, as a basis for negotiation, the principles passed at a conference of the Land Entitlement Chiefs at Thompson. And again, I won't read the following six principles as they have been stated already.

We, as a Coalition, cannot view this Land Entitlement Commission in isolation of the full struggle of Native people. If, as a nation, we say that we want to act in all fairness with Native people, this must be one of the first steps that we take to rectify our relationship. It is our perception that the Province of Manitoba will be under increasing pressure by the other provinces, and by the Federal Government not to act justly. We ask the Commissioner to present to the Manitoba Government our desire that they indeed be the advocates of Native people, and to

be prophetic in their implementation of land entitlement.  
"(emphasis added)

5. The Manitoba Committee of the Communist Party of Canada submitted similar views to those expressed by the aforementioned church groups.
6. The Land Entitlement Chiefs Committee and each of the individual entitlement Bands who filed a submission uniformly urged the adoption of the following principles:
  1. Current Band population statistics are to be used to calculate the amount of unfulfilled treaty land entitlement. (The Treaty Formula).
  2. The Treaty provisions of 32 acres per capita (Treaties 1, 2, and 5) or 128 acres per capita (Treaties 4, 6, 10) are the basis for the calculations.

E. MATTERS THAT OUGHT TO BE CONSIDERED WHEN SEEKING AN AGREEMENT

1. What factors should one consider in arriving at a fundamental, crucial recommendation which will have a serious impact on the negotiations? I think the following are essential:
  - a) Each party to the negotiations no doubt believes that its position is fair and equitable and should be acceptable by the other parties. But each party knows that if this stance prevails no mutually acceptable agreement is possible. The notion that one view reflects a fair and equitable solution and all others are unfair and inequitable leads to rigidity and is inconsistent with the realistic approach essential to permit negotiations to succeed.

- b) Negotiations have a chance to succeed if each party comes to the table not only with the intention to present its views as forcefully and persuasively as possible with candor and integrity but also to hear and examine carefully the position of each other party. The negotiation process requires, inter alia, that each party commit itself to a search for a mutually acceptable solution. To do so each party must attempt to find a formulation that will be acceptable to the other interested parties.
  - c) This approach has the best chance of success if each party considers it to be in its self-interest to conclude an agreement within a reasonable time span, ie., each party is persuaded that an agreement which will settle the problem is desirable in the shortest possible time.
  - d) If each party is sincere in seeking an agreement with the other interested parties then each will also be prepared to consider a compromise that may be acceptable to the other parties.
2. The evidence submitted to the Commission is overwhelming in establishing that the amount of land entitlement has virtually always, since the prairie treaties were concluded, been determined by the population of the Band membership at the time the land requested is surveyed multiplied by the acreage per capita set out in the applicable treaty. This basis or formula has been enunciated by Canada repeatedly as its view of its obligations under the prairie treaties, and has been

acceptable to the Indian Bands as well as the Saskatchewan and Alberta governments at various points in time. (The acceptance of this "formula" by Alberta is referred to in the letter from the Hon. Warren Allmand and to the Hon. Lou Hundman, dated June 23, 1977. See Appendix "CC")

3. It is true that on occasion the provincial governments have urged that other formulae be used to define Canada's obligation under the treaties.
4. The fact is that the Saskatchewan formula was not only adopted by the Minister of Indian Affairs and the Government of Canada but was described as recently as November 16, 1982 (App. "DD") and November 25, 1982 (App. M) as being "fair", "reasonable" and "equitable". And it is clearly the Minister and the Government of Canada who are responsible for formulating Federal policy. Furthermore Canada urged the governments of both Alberta and Manitoba to adopt the Saskatchewan formula and to settle the outstanding land entitlements in their provinces as soon as possible. I find these positions of the various recent Ministers of Indian Affairs to be not only commendable but a realistic approach to make possible a final mutually acceptable settlement of this issue.
5. It is a fact that with the exception of the difference in the amount of land per capita, and some other minor matters, the treaties are similar. As Lieutenant-Governor Archibald said in his letter to the Secretary of State for the Provinces dated July 22, 1871:



"In fact, the terms we now agree upon will probably shape the arrangements we shall have to make with the Indians between the Red River and the Rocky Mountains." (The Treaties of Canada with the Indians, p. 32).

6. However, the Indian Bands propose that the adoption of the Saskatchewan formula means adoption of the principle of using "current band population", and that the "cut-off date" be December 31st of the year prior to reaching agreement. That principle is consistent with precedent.
7. The Band's position would result in an agreement concluded in 1983 to require the application of the December 31, 1982 Band membership to determine the amount of land entitlement. That would reflect the principle adopted in arriving at the Saskatchewan formula, not the formula itself.
8. It is realistic to assume that a different interpretation and application of the similar prairie treaties, some of which apply to lands in more than one province, will create discord among the Indians and the Provinces and make agreement very unlikely. I am therefore of the opinion that it is essential to adopt a uniform interpretation of those treaties in relation to the method that should be used to determine the quantum of outstanding land entitlement if the parties are to succeed in settling the land entitlement issue on a fair and equitable basis. In this respect I share the anxiety expressed by the Mennonite Central Committee (Canada) et al. as follows:

"We urge that this province respect the precedence set in Saskatchewan in order to avoid dispute over variations in settlement of claims.

"Our anxiety is over the possibility that each province might settle very differently thus creating a new source of fractioning among the Indian peoples."

9. In 1982 a uniform, fair and equitable interpretation of Canada's obligation under the Treaties requires the uniform application of the Saskatchewan formula.

## XII. RECOMMENDATION OF THIS COMMISSION CONCERNING THE ISSUE OF QUANTUM

1. I recommend that in the interest of uniformity the Saskatchewan formula as agreed be the compromise, rather than the principle of current band membership. If this compromise is accepted by all parties it will mean that the applicable population date in Manitoba will also be December 31, 1976 and "beyond that date entitlement will not grow", as stated by the Hon. Warren Allmand in his letter to Premier Schreyer of Manitoba dated July 13, 1977. (App. BB).
2. In order to encourage the parties to address the negotiations for settlement with dispatch and make every reasonable effort to conclude an agreement, the parties may agree that an independent neutral person acceptable to each of the parties be appointed to assist their efforts to reach agreement. Such a person ought to be the mediator, and the parties may agree to authorize such a mediator to give an opinion as to the failure of any party to negotiate in good faith and to set out in

writing the basis on which he relies in reaching such a conclusion. The party or parties named ought to be given the opportunity to respond promptly and explain its alleged misconduct in writing. After this exchange of correspondence between the mediator and the parties affected the said correspondence may be made public by any party to the negotiations.

XIII. A REVIEW OF MATTERS CONCERNING LANDS THAT OUGHT TO BE MADE AVAILABLE  
FOR SELECTION BY THE BANDS

I shall now address the issue as to which land ought to be available to an Indian Band from which they may select the amount of acreage entitlement found to be due to it.

A. THE TREATY

1. Prior to 1930, all unoccupied Crown land in Manitoba was held in the name of the sovereign in the right of Canada. The province was not involved in any way in the determination and settlement of the land entitlement obligations due to Indian Bands. It was not involved in determining the amount of land, the quality of land, or the location of the Crown land which would be set aside as a reserve. In sum, it was the obligation of Canada alone to settle these matters with each Band.
2. If any settlers occupied any land within the bounds of the land selected by a Band, then the language of the Treaty would apply. In the case of Treaty No. 1 dated August 3, 1871 the words used were:

"...it being understood however, that if, at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just, but so as not to diminish the extent of lands allotted to the Indians,..." (emphasis added).

3. Treaty No. 2 provides:

"... And with regard to the remainder of the Band, a Reserve shall be selected for them in some suitable locality, by Her Majesty's said Commissioner or special Commissioner, with the approval of the said band; it being expressly understood that Her Majesty reserves with regard to all the said Reserves, the right to deal with any settler who may be found after the selection of any Reserve theretofore settled within its limits as she shall deem just, but so as not to diminish the extent of lands allotted to the Indians,..." (emphasis added).

4. Treaty No. 3 provides;

"...and such selection shall be made if possible during the course of next summer or as soon thereafter as may be found practicable, it being understood, however, that if at the time of any such selection of any reserves as aforesaid, there are any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to Indians; and provided also that the aforesaid reserves of lands or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained." (emphasis added)

5. Treaty No. 4 provides:

"And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no ways

shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves."  
(Emphasis added)

6. Treaty No. 5 & No. 6 provide:

"...Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained." (Emphasis added)

7. It appears that the Treaties contemplate that Canada will set aside as reserves such lands as the Bands and Canada may select, and that if any settler occupies any part of the land selected the Crown will resolve that interest in land with the settler in a just manner. In any event, the resolution will not affect the extent of land set aside as a reserve.
8. There is no reason why these provisions in the Treaty should not be given contemporary effect, except to the extent that a Band and Canada may agree otherwise. Some occupiers and the people of the province have benefited substantially, for example, in the development of northern mining and northern hydro generating facilities. They have benefited for many decades during which the debt due to Indian bands remained unpaid. The Chiefs of the entitlement bands do not propose to disturb such users. However, delay should not prejudice the opportunity and right of these bands to obtain the additional reserve land of their choice to which they are entitled, subject to a just settlement with present occupiers and users.
9. A reading of the literature describing the circumstances surrounding the negotiations of the treaties leaves no doubt that the representatives of

the Crown made representations to the Indians which included the Crown's concern that the Indians would be able to select and should select such land as will enable them to be economically self-sufficient. The words used by Lt. Gov. A.G. Archibald were in part:

"These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms will be required. They will enable you to earn a living should the chase fail and should you choose to get your living by tilling, you must not expect to have included in your reserve more of hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers...."  
(Morris - p. 29)

"When you have made your treaty you will still be free to hunt over much of the land included in the treaty....

...Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past... and if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate...." (Treaties with Indians of Canada p. 29) (emphasis added)

10. The contemporary expression of those representations would be, I think, that reserve lands are to be such as would "enable you to earn a living, or be of socio-economic value". As the Hon. J. C. Munro said, the land made available should be "quality Crown land," (App. DD)
11. The Bands have submitted, and it is consistent with common experience, that if the land obtained as a settlement of their entitlements contributes significantly to their well-being, the entire Manitoba and Canadian non-Indian community will share in such beneficial results. The increased income will reduce the Indians' economic dependency on the non-Indian, ie., reduce government welfare expenditures in meeting Indian needs for sustenance. It will add to the productivity of Indian people and improve their self-image. The economic advisers to the

Indians estimate that if the Bands obtain all their land entitlements as they calculate it, the income of the Bands will in due course increase by \$39,000,000 annually. If that is a reliable estimate, it is significant for non-Indian entrepreneurs who will also benefit from the increased economic development of the Indian Band.

B. Recommendations

1. Specifically, I recommend the following:

- a) that each Indian Band with land entitlement be given the opportunity to select provincial Crown land of such quality and in such location as the Band may decide, provided:

- (i) that selection of land by a Band is within the area ceded by the Treaty to which the Band is signatory, and,

- (ii) that selection of land by a Band is from Crown land that was unoccupied Crown land as at July 15, 1930.

- b) that the land which has been selected be transferred to reserve status subject to settlement of any third party interests in the land, in a manner acceptable to such third party and the governments of Canada and Manitoba, provided:

- (i) that settlement of any third party interests must be reached within a time limitation (one year, for example) as may be agreed upon by Canada, the Bands and Manitoba, and,



(ii) if settlement is not reached within that prescribed and agreed upon term and the third party has not negotiated in good faith, the land will be transferred to reserve status in a manner which honors the existing rights of such third party.

2. I consider that any agreement which will increase productivity, generate greater economic activity, improve the well-being of under-privileged Indian people, and thereby reduce economic dependency on governments, is consistent with the public interest.
3. It is also essential that the Indian Bands be provided with adequate funds to enable them to make a prudent land selection based on independent expert advice as to the viability each parcel of land may furnish to an owner.
4. I would recommend that the work of the experts employed be made available to each party in order to avoid unnecessary duplication and expense. If work has already been done in this area then the documentation and findings should be shared with all parties. If the parties cooperate in sharing information both time and money will be saved.

#### XIV. THE SIX PRINCIPLES SUBMITTED BY THE LAND ENTITLEMENT CHIEFS COMMITTEE

1. No representatives of any organization submitted to the Commission that the outstanding land entitlement found to be due to an Indian Band

should not be resolved on a contemporary, fair and equitable basis. Furthermore, the representatives of many organizations supported without qualification the six principles enunciated by the Land Entitlement Chiefs Committee. Those principles are as follows:

- a) "Current Band population statistics are to be used to calculate the amount of unfulfilled Treaty entitlements, which we refer to as the Treaty formula.
  - b) The Treaty provisions of 32 acres per capita, signed under Treaties 1, 2, 5 or 128 acres per capita, signed under Treaties 4, 6, 10, are the basis for the calculations.
  - c) Treaty entitlement transfers shall include mines and minerals as in all past entitlement transfers in Manitoba in accordance with Section 12 of the Manitoba Natural Resources Transfer Act.
  - d) Where possible, selection should be made in blocks contiguous or near to existing reserves in a manner that best suits the needs and interests of the bands.
  - e) All reserves established contiguous to navigable waters under the provisions of Section 11 of the Manitoba Natural Resources Transfer Act and the terms of the Treaties shall extend to the ordinary high water mark of any river or lake.
  - f) For all land transferred under Section 11 of the Manitoba Natural Resources Transfer Act pursuant to the Treaty formula, bands are agreeable to the Province acquiring land for designated public purposes provided that such acquisition is clearly in the public's and the band's interests and that there is a mechanism acceptable to the bands which guarantee the band's right to select alternate lands or other compensation."
2. RE: Principle No.1: The question which is asked is: "the population at which date should be used as a basis for arriving at the amount of unfulfilled land entitlement remaining due to each band?" This issue has been analyzed and dealt with at some length in this report and the Commission has made its recommendation.
3. RE: Principle No. 2: The Roseau River Indian Band made the only submission other than that of the Land Entitlement Chiefs Committee. They stated that:

"the Treaty Formula is already a modest one. It ignores the Treaty land disparity (that some bands get 32 acres/person, and some 128 acres/person). The band will accept the lowest figure in return for settling this matter (even though it would still be fair to ask the 128 acres/person)."

4. This principle is not a matter in dispute. The number of acres due per member is determined by the applicable Treaty.
5. RE: Principle No. 3: Only the following representatives submitted that sub-surface rights of any land transferred to be set aside as reserve land shall be retained by the Province:
  - a) Mr. Sidney Green on behalf of himself and The Progressive Party of Manitoba; and,
  - b) Mr. DeGroot for the Thompson Industrial Commission; and,
  - c) Mr. H. Bloy for the Mining Association of Manitoba.
6. Mr. Green's submission was, in essence, that "the mineral resources of this Province shall continue to belong to all of the people of the Province, to be used for the benefit of all, including the benefit of the people of Treaty Indian descent; and any other suggestion would deprive, in my view, one or the other of those groups from the benefits which should accrue from those mineral resources".
7. The Thompson Industrial Commission and The Mining Association of Manitoba expressed essentially the same view. The Thompson Industrial

Commission submitted: "That all settlements be fair and just for all citizens of Manitoba" and "that the extraction of resources be under the control of the province". The Mining Association of Manitoba submitted that: "It is the belief of this Association that mineral rights of any land transferred for treaty land entitlement should be retained by the province for the benefit and betterment of all Manitobans".

8. On the other hand, the policy of Canada in setting aside land as reserves for Indian bands has been from the very outset, since the 1870's, to convey all sub-surface rights with the land so selected and set aside.
9. At the time the terms of Treaty 3 were the subject of negotiation, the issue of minerals arose, reported by the Hon. Lieutenant-Governor Morris as follows:

Chief - "Should we discover any metal that was of use, could we have the privilege of putting our own price on it?"

Governor - "If any important minerals are discovered on any of their reserves the minerals will be sold for their benefit with their consent, but not on any other land that discoveries may take place upon; as regards other discoveries, of course, the Indian is like any other man." (emphasis added)  
(The Treaties of Canada with the Indians, p. 70).

10. The Minister of Indian Affairs, the Hon. Warren Allmand, in a letter addressing the Hon. Lou Hyndman, then Minister of Intergovernmental Affairs, dated June 23, 1977, (Appendix "CC") stated:

"Secondly, it has always been understood that upon transfer of lands to Canada for Indian reserve purposes, mines and minerals, and other subsurface rights would be and have been included in the transfer. The Natural Resources Transfer Act does not derogate from this position, for it states that all lands conveyed under Section 10 (same as Section 11 in MNRTA) "shall thereafter be administered by Canada in the same way in all respects as if they

had never passed to the Province under the provisions hereof". You will also note that Section 11, incorporating by reference certain provisions of a 1924 Indian Lands Agreement between Canada and Ontario, deals with the disposition by Canada of moneys derived from mineral developments on Indian reserves. This section could have no effect were the mines and minerals not included in lands returned to Canada for Indian reserve purposes." (emphasis added).

11. The "Policy Guidelines of the Province of Manitoba Covering Indian Land Entitlement", released October 25, 1978, state in part:

"Treaty entitlement transfers shall include mines and minerals as in all past entitlement transfers in Manitoba in accordance with Section 12 of the Manitoba Natural Resources Transfer Act." (emphasis added)

12. The position enunciated by Mr. Green regarding the ownership of sub-surface rights is a philosophic one. It ignores the context in which the issue of land entitlement pursuant to obligations under treaties is raised. It ignores the fact that the parties, ie., Canada, the Indian Bands and Manitoba, are in agreement in principle on this matter. The purpose of this Commission is a pragmatic one. It is to recommend principles which will lead to a fair and equitable settlement within the aforementioned context and is not for the purpose of considering or creating philosophic obstacles to reaching agreement.

13. RE: Principle No 4: The submission of of the Land Entitlement Chiefs Committee reads that:

"Where possible, selections should be made in blocks contiguous or near to existing reserves in a manner that best suits the needs and interests of the bands."

Essentially, I understand this to mean that in all cases where it is practical and advisable to do so, the bands will wish to select suitable land near the present boundaries of their reserve. This position is understandable.

14. The Manitoba government in its "Policy Guidelines" of October 25, 1978, sets out its policy on this matter as follows:

"(4) As much as possible claims should be taken in single blocks contiguous to existing reserves. However, the geography of northern Manitoba will not always permit this, requiring exceptions to provide land that can be of some use to the bands. Sites for settlement purposes will normally be smaller in size and will be chosen in terms of drinking water supply, access, hydro availability, building sites, etc." (emphasis added)

15. I think it may be agreed that each band will have the freedom to select out of the unoccupied Crown land extant in 1930 in Manitoba, within the boundaries of the applicable treaty such land as it may decide will best serve its needs and interests.

16. I sense that the three parties are essentially in agreement that in the final analysis it is for each Band to select its land entitlement out of the lands available for transfer, it being understood that the purpose of land shall be to provide a practical opportunity to enhance the well-being of the band's members.

17. RE: Principles 5 & 6 The fifth and sixth principles adopted by the Land Entitlement Chiefs Committee read:

5. "All reserves established contiguous to navigable waters under the provisions of Section 12 of the Manitoba Natural Resources Transfer Act and the terms of the Treaties shall extend to the ordinary high water mark of any river or lake."

6. "For all land transferred under Section 11 of the Manitoba Natural Resources Transfer Act pursuant to the Treaty formula, bands are

agreeable to the Province acquiring land for designated public purposes provided that such acquisition is clearly in the public's and the band's interests and that there is a mechanism acceptable to the bands which guarantee the band's right to select alternate lands or other compensation."

18. The Hon. Brian Ransom, the Minister responsible under the Lyon Government for negotiations with Canada, in his letter to the Federal Minister of Indian Affairs dated May 15, 1979 (Appendix A page 474-475), stated succinctly Manitoba's concern was: "to ensure public access and to prevent flood damage claims".

19. He stated:

"For all practical purposes, in most reserves provincial ownership of shorelines will not unduly restrict Indian use of the area except to prohibit erection of structures. Where necessary, leases can be issued to Bands for the land in question."

20. The Hon. Ransom sought the retention of a 99 foot strip from the ordinary high water mark, ie., "Land up to a minimum of 99 feet from the ordinary high water mark will be retained in the name of the province but leases may be made available to bands for the use of these areas without Manitoba or its agencies assuming liability for flood or other damages."

21. This 99 foot strip, in The Hon B. Ransom's view, was necessary for two reasons:

- a) to ensure access to the waterways and shorelines by the public; and,
- b) to prevent damage claims arising from flooding of land not owned by the province.



22. The right of access by the public to the waterways and shorelines is enshrined in Treaty 1 and 5, and accordingly there is no requirement for the 99 foot "holdback" of land from the ordinary high water mark for this purpose. Treaty No. 1 & No. 5 deal with this matter as follows:

Treaty No. 1 (June 20, 1876 revision) states:

"...but in case any of the said Reserves embrace any river or lake, or any part thereof, the free navigation and free access to the shores thereof, for Her Majesty's subjects, is hereby expressly reserved:...."(emphasis added)

Treaty No. 5 includes a provision that:

"... but reserving the free navigation of the said lake and river (ie. Lake Winnipeg and Beren's River), and free access to the shores and waters thereof, for Her Majesty and all Her subjects." (emphasis added)

23. It is apparent that Treaties 1 and 5 enshrine the principle of ensuring free access to waterways. Indeed, the Chiefs of the entitlement Bands agree "that public access to shoreline and free navigation of all waters flowing through reserves was guaranteed by virtue of the terms of the Treaties and therefore the (first matter raised by the Hon. B. Ransom) was (is) a non-issue."
24. The other reason relied on by The Hon B. Ransom to seek retention of a 99 foot strip beyond the high water mark in the name of the province was to avoid liability for damages due to artificial flooding of this area.
25. There are thousands of homes in Manitoba erected by non-Indian residents within 99 feet of waterways. One need only travel along the Red and Assiniboine Rivers to make that observation. But the government of Manitoba has the power to expropriate such land that may be required for public purposes, whereas it does not have the power to expropriate Indian reserve land. It is this issue that is addressed in principle No. 6 submitted by the Chiefs.

26. The stance that was taken by the Hon B. Ransom and Manitoba Hydro is based on two grounds. The first one is a principle that Indian Reserve lands should not be held to have special rights which are not equally applicable to all other lands. But the fact is that they do. One of these rights is that only Canada and not the Province has the power to expropriate reserve land. Indian Reserve lands are held in the name of Her Majesty in the right of Canada and hence the registered owner is not the same as any other landowner. The lands are so held pursuant to the Crown's undertaking arising out of Treaties to set aside land selected by the Indians for the latter's exclusive use. That undertaking is one in perpetuity. In the words of the Crown's representatives it is on going "for as long as the sun shines". As stated by Mahoney J. of the Federal Court in 1979 (to give a more contemporary view of the undertakings contained in the treaty):

"It (Treaty No. 8) does impose and confer continuing obligations and rights on the successors of the Indians who entered into it, provided those successors of the Indians are themselves Indians, as well as on Her Majesty in the right of Canada." (Town of Hay River v. The Queen (1979) 2 C.N.L.R. p.101, at 104) (emphasis added)

27. It is obviously misleading to enunciate a principle, no matter how lofty and seemingly fair and equitable, which is neither applicable nor just in the circumstances and context of the obligations under consideration. The obligations to Indians pursuant to the Treaties are the foundation of the debt due by reason of the failure, by the Crown, even at this late date, to fulfil its land entitlement obligations.

28. Mr. Green of the Progressive Party and the Hon. B. Ransom representing the Lyon Government, have in this respect, in my view, adopted an untenable, unfair and inequitable premise in seeking to persuade the

dominant non-Indian majority of the Manitoba population that Indian reserve lands are no different, or ought not to be different, than other landholders. That premise is based in essence on the false assumption that no Treaties were entered into between the Crown and Indian Bands, and is further based upon the untenable proposition that the obligations arising out of each Treaty to the Bands are not ongoing until fulfillment is completed.

29. Notwithstanding the above comments, this concern of the province to avoid liability for flooding, and to enable it to obtain and use land needed for public purposes within a reasonable time, is a very pragmatic matter. It expounds the practical need that the province must have the authority to do what is necessary for the public good. More specifically, the position of the Hon B. Ransom is based on the experience of undue costly delay in enabling Manitoba Hydro to flood, or have the right to flood, certain reserve lands in order to construct Hydro generating facilities on the Burntwood and Nelson Rivers, and a desire to limit potential provincial liability by reason of damage caused as a result of proceeding to act in the public interest.

30. In a letter from the Hon. B. Ransom to the Hon. H. Faulkner dated May 15, 1979, (Appendix "A" page 474-475) it is stated that:

"Indian lands should be subject to expropriation under the same conditions as land owned by other Manitobans. Without the assurance from Canada that Section 35 will be used this way, the Province must be extremely cautious in the lands it approves for transfer, attempting to anticipate all future public requirements." (emphasis added).

31. And in a letter dated May 17, 1979 (Appendix A page 474-475) which is addressed to Mr. Whitehead president of the then Manitoba Indian Brotherhood from Hon. B. Ransom, it is stated that:

"Manitoba cannot obtain Indian land for public purposes in the same manner that land is acquired from non-Indian citizens. Without the power to expropriate, the province needs to avoid situations where a provincial government enters into negotiations with an Indian Band where the Provincial bargaining position may not enable the public interest to be served. To remove this possibility, the government needs to exercise its expropriation powers. To protect the rights and interests of all affected citizens, it is suggested that public enquiries and bodies such as the Land Value Appraisal Commission may be used to objectively assess compensation payments required." (emphasis added).

32. Further, in a letter from the Hon. B. Ransom to Mr. Longclaws dated June 16, 1981, (Appendix A pages 479-480) the Hon B. Ransom stated:

"the existing process of obtaining Indian reserve property for public projects has proven impractical." (emphasis added).

33. It was reported in the Winnipeg Free Press on June 21, 1978, (Appendix "A" page 453) that:

"Specifically, they (the Honourable Premier and Hon. B. Ransom and Hon. H. Bostrom) advised:

That the Province get a firm commitment from the Federal Government that the Province could acquire reserve land for demonstrably needed projects in return for compensation without the Indian people having a veto power over acquisition." (emphasis added).

34. In a letter dated January 12, 1979, (Appendix A page 457-462) from the Hon. H. Faulkner to the Hon. B. Ransom, it is stated that:

"from Manitoba's policy guideline paper I note that it is the province's intention to exercise this power (of veto of transfer) with respect to all lands which it considers may be required in future for public purposes. I understand that the reason for this is the Department of Indian Affairs policy on the taking of Indian reserve lands under Section 35 of the Indian Act", and, "at the present time, I do not foresee any change from current policy, which is not to allow the taking of reserve land without the consent of the band council, except where the national interest dictates otherwise." (emphasis added)

35. What the province has asked for has been "the assurance from Canada that Section 35 will be used (so that Indian lands are subject to expropriation)", ie., "a firm commitment from the Federal government that the province could acquire reserve land for demonstrably needed projects... without Indian people having a veto power over acquisition".

36. Canada, quite properly in my opinion, in its position as Trustee of the Indian reserve lands, refused to refer the matter of provincial expropriation to the Governor-General-in-Council under Section 35 of the Indian Act without the consent of the Indians "first had and obtained".
37. However, the Chiefs of the entitlement Bands are now willing to negotiate an arbitration provision in an agreement with the governments, to both expedite and resolve any impasse arising out of circumstances in which the province needs certain lands for public purposes. This is reflected in principle number 6 submitted by the Chiefs. The proposal of the Indians is not set out with the specificity necessary to meet the real needs of the province. Agreement on the basis of that proposal, however, will result in obtaining the consent of the Indians required by the policy of Canada, to enable the latter to invoke Section 35 of the Indian Act. Moreover, principle 6 does reflect in principle the readiness of the Indian representatives to refer disputes concerning compensation and/or alternate lands, to an agreed upon impartial neutral third party for final and binding decision, should the parties be unable to resolve such a dispute within a reasonable time.
38. What may be seen as problematic in the proposal of the Chiefs is the provision that "acquisition (must be) clearly in the public's and the bands' interest". (emphasis added)
39. In many circumstances what is in the public interest, except to the extent that Band members are also members of the public, may not be seen by the Band to be in its interest. It is circumstances where the land

is required in order to serve the public interest and the Band deems acquisition of their reserve land by the Province to be not in the interests of the Band, which must be dealt with.

40. The words "and the Band's interest" can make a settlement of this issue impossible, because these words would bestow on the Band a power to veto the transfer of any reserve land to the Province to enable it to carry out a project for bona fide public purposes. It provokes a problem similar to the problem as it now stands, viz., that Canada will not invoke Section 35 of the Indian Act without consent of the Indian Band, since the Band could therefore frustrate the development of a project required to serve a bona fide public purpose.

41. It seems to me that the following words in Treaty 10 speak to the principle involved in this matter:

"It is further agreed between His Majesty and His said Indian subjects that such portions of the reserves and lands above mentioned as may at any time be required for public works, buildings, railways or roads of whatsoever nature may be appropriated for such purposes by His Majesty's government of Canada due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area so appropriated (by Canada)."

These words contemplate, in the opinion of the Commission, that Indian bands would not have the power to withhold "appropriation" of reserve land required for public purposes by Canada, on the undertaking that due compensation would be awarded for any reserve land taken by Canada for public purposes. The province however does not have that power under the Treaty.



XIV. - (A) Recommendation Regarding Principles 5 & 6

1. The Commission recommends that when lands to be transferred to fulfil entitlement may be required by the province for a specific project to serve a bona fide public purpose, that the principle outlined in Treaty 10 (para. 41) shall apply, and that it be given practical effect.
2. I shall now summarize the problems which the Province, the Bands and Canada face when the Province requires land from the lands to be transferred to fulfil the present outstanding land entitlements.
  - a) The Province has no authority to expropriate reserve land. Only Canada has that power under the Indian Act.
  - b) Pursuant to Treaty, only Canada has the right and authority to appropriate reserve land for its public purposes, provided due compensation is paid to the band. (see Treaty 5)
  - c) Canada refuses to consent to expropriation of reserve land for public purpose of Manitoba without the consent of the Band affected.
  - d) The Bands have withheld consent in circumstances where the province failed, in the opinion of the Band, to first negotiate in good faith a compensation settlement acceptable to them. Therefore Canada refused to invoke its expropriation power under the Indian Act.



3. The above is, I think, a realistic summary of the major problems experienced during the 1970's by the Province, Manitoba Hydro, Canada and the Bands, that are relevant to a settlement of Indian land entitlement.
4. In order to overcome these problems and thereby avoid a repetition of that experience, the Commission recommends that the procedure which will be described be included in the proposed agreement to govern only lands to be transferred as reserve land to fulfil the outstanding land entitlement due to certain bands. This procedure shall be followed in circumstances where the Province requires a portion of reserve land for a specific project required to serve bona fide public purposes.
5. Before describing that procedure, it may serve well to deal with one further matter. I am informed that Manitoba Hydro has reserved vast areas of land in northern Manitoba which may never be required for any presently planned specific project. Indeed, it may be that vast areas of that land reserved for Hydro may never be required for any project. It is specifically intended by me not to sanction any such wholesale reservations of land that may deprive Indian Bands from exclusive use of reserve land contiguous to waterways. The procedure recommended, if included in the proposed agreement between Canada, Manitoba and the Indians, will make it unnecessary to obtain express consent from an Indian Band in the future, to enable Canada to do what is necessary to convey reserve land to the Province where it is required for a specific project to serve the public interest. This will be so because the Bands

upon entering such an agreement will have given consent to Canada to transfer such required land to the province, in the circumstances described therein.

6. The proposed agreement between the Bands, Canada and Manitoba ought to state that it is agreed by the parties thereto that the following provisions relating to the transfer of reserve land by Canada to the province to enable it to proceed with specific projects for public purposes shall apply only to reserve land established pursuant to the terms of that agreement.

7. The recommended provisions are that:

- a) The province shall undertake to give written notice to Canada and each Band affected of its requirement to obtain certain reserve land. The said notice shall describe the area of land required for the specific project to serve bona fide public purpose.
- b) If Canada and the Band(s) which may be affected agree that the public purpose is bona fide, then the authorized representatives of Canada, the Bands affected and those of the Province shall meet not later than 30 days thereafter, unless the authorized representatives unanimously agree otherwise, to hear explained fully the project for which the area of land is needed and the adverse and/or favorable impacts the specific project is expected to have on the Band's assets and/or its residents. If any of the parties, including the Bands affected, question in writing within

four weeks after receipt of the notice, the bona fides of the specific project as one required by the Province to serve the public interest, then this issue shall forthwith be referred to the tribunal consisting of one or four persons as hereinafter described, for final and binding determination. If the tribunal determines that the specific project is required to serve the public interest, then the bands affected hereby agree that such determination shall constitute consent by each of those bands to Canada to proceed to do what is necessary to convey the land required to the Province on such terms as the tribunal may have imposed.

- c) If neither the Bands affected nor Canada question the bona fides of the need of the reserve land by the Province for the aforesaid purposes, then it shall be held that each Band affected has given its consent to Canada to do what is necessary to convey the land required by the Province for that project, by reason of such Band(s) having received land entitlements pursuant to the terms of this agreement.

The said representatives shall commence forthwith to negotiate and make every reasonable effort to reach a mutually acceptable settlement concerning compensation and/or selection of alternate lands and/or other forms of compensation which may be acceptable to the parties.

- d) If the parties agree that a deadlock has occurred in the negotiations concerning alternate lands and/or compensation, or a period of more than three months have elapsed, whichever occurs later, and each party has negotiated in good faith and made every reasonable effort to reach a mutually acceptable settlement, then any party having conducted itself as contemplated herein may give notice in writing that it wishes to refer the matter of compensation for final and binding decision to an impartial tribunal.
  
- e) If the party giving notice seeks a four person tribunal, it shall in its notice give the name and address of its nominee, and each of the parties receiving the notice shall in writing give the name and address of its nominee to the other parties within 10 working days after receipt of the notice. The nominees of each of the parties shall meet within ten (10) working days of the date of their nomination for the purpose of agreeing to a fourth member who shall be the chairman of the tribunal. If they are unable to agree on a chairman within five (5) working days of their first meeting or if any party has failed to appoint its nominee then the nominees shall so inform the parties, and any party may then request Justice R.A. Matas of the Court of Appeal or Justice Guy Kroft of the Court of Queens Bench or Judge Patrick Ferg of the County Court to appoint the fourth member of the tribunal, or the nominee of any party that failed to nominate its nominee.

- f) Each of the nominees shall, when agreeing to act, also indicate in writing that he is able and willing to act expeditiously and will make himself available without any undue delay.
- g) The tribunal shall first endeavour to assist the parties to reach a mutually acceptable resolution, and only if no progress is made within a reasonable time in the opinion of the chairman, shall the tribunal hold quasi-judicial hearings, and determine the following matters:
  - (i) Whether the specific project as described is or is not for a bona fide public purpose, if that is a matter of contention between the parties referred to the tribunal; and,
  - (ii) If the tribunal decides that it is not for a bona fide public purpose then that is the end of the matter. If it is bona fide, then the tribunal shall decide what ought to be the amount of compensation in land, money, remedial measures or other like compensation, or in one or more of these forms of compensation, it being understood that the band shall have the opportunity to decide what form or forms of compensation it shall receive.
  - (iii) The decision of the tribunal shall be in writing and shall be delivered by Registered Mail to each of the parties within 40 working days after the date of the first meeting of the tribunal.

h) The parties or the tribunal may by unanimous agreement extend or alter any or all time limits mentioned herein.

3. The above proposal is an example of a procedure which I believe will facilitate addressing expeditiously the settlement of any dispute arising out of the need for the use of reserve land by the province for bona fide public purposes and minimize the time within which the land become available for those purposes. It settles the fear of the province that an Indian Band may veto, or unduly delay, a specific project required to serve the public interest. It ensures the members of Band(s) affected that negotiations will be carried on in good faith with their representatives and in the event of failure the dispute as to compensation will be settled justly with their participation and involvement in the settlement process.

XV. Additional Proposals Submitted by the Land Entitlement Chief Committee

1. The Chiefs of the Entitlement Committee submitted additional proposals and comments to define their view of a fair and equitable contemporary settlement. These are:
  - a) That the quality of the land selected and transferred to satisfy unfulfilled land entitlement must be such as to provide the Bands with a realistic opportunity to enhance the socio-economic well-being of its membership.

2. Their studies lead them to the conclusion that their gross annual revenue from commercial fishing, trapping, mineral exploitation and forestry sales could be as high as \$39,000,000. This increased income to the Bands would benefit substantially many of the non-Indian suppliers of goods and services, and indeed would benefit all Manitobans and Canadians. It certainly will benefit all the Canadian taxpayers since the economic welfare dependency of Indians will decrease.
3. It seems to the Commission that the matter most relevant to land selection, once the amount of land due is settled, is that ultimately the Band must decide which land will satisfy its entitlement. In order to make that decision the Band must be given the funds necessary to enable it to make a wise decision. The Commission has already stated that in its opinion the land from which a Band may select its entitlement is from the Crown land which was unoccupied and was transferred by Canada to Manitoba under the Manitoba Natural Resources Transfer Agreement (1930), as is contemplated by Section 11 thereof provided it is within the area the Band has ceded by Treaty.
  - b) Much of this land which is valuable may now be occupied or owned by private persons, ie., the province may have granted rights which encumber this land to public agencies, private persons or to companies, and inevitably problems will arise under these circumstances which have been created since 1930.
4. The Chiefs of the entitlement Bands have addressed these inevitable problems as follows, viz.,:



- a) The Chiefs are opposed to expropriation of privately owned land for the purpose of fulfilling land entitlement. At The Pas hearing the Chairman, Chief Jim Bear submitted:

"just as we do not wish to have the legal rights of private landowners expropriated to fulfil our entitlements we also do not wish to have the land (tax) base of municipal governments in Manitoba adversely affected as part of the solution to this problem. (p. 274 - 5 of the Transcript) (emphasis added)

- b) "The vested rights of those in the occupation of Crown land at present should not have those rights interfered with in any way in order to have land entitlements fulfilled; but rather that:

"The consent of those currently in occupation is a necessity before any of those lands should be made available to any band;" and,

- c) "A purchase policy must be developed by this Commission in order that sufficient funds can be made available to the bands for them to (be able to) enter into purchase arrangements with local landowners who may be willing to sell their land at fair market value." (see the transcripts of the submissions made at the public hearing conducted in Winnipeg); and,
- d) "Crown lands which the Provincial or Federal Government have currently designated as being for public purposes such as parks, wildlife management areas, and so forth, should remain so and we would anticipate, would not likely be available for selection."

5. The above-mentioned proposals by the Chiefs of the land entitlement Bands are deserving of high praise and commendation. They display an unusual generosity and thereby should allay and put to rest many fears of the non-Indian landowners and users of land which was unoccupied Crown land in 1930. The Chiefs' proposals explicitly recommend that for the purpose of paying the debt due to them in the form of land that:

- a) There be no expropriation of a privately owned land.
- b) That the rights of an occupier or user of land not be disturbed.

- c) That a Municipality shall not suffer a net loss in income due to the loss of tax income by reason of the transfer of land to reserve status.
  - d) Land used for public Parks and Wildlife Management Areas and other similar public interests projects would not be "available for selection" for the purpose of paying the land entitlement debt due to Indian Bands.
6. In return the Chiefs propose a purchase policy by establishing an adequate fund to ensure that when land selected by the Bands become available for sale, or if the Bands can negotiate the purchase of a piece of land, money will be readily available to purchase such land. They also propose , in return, that the agreement provide that a mechanism for implementation be established.
7. The Commission will now address those proposals of the Chiefs which require some elaboration.
- a) The Chiefs' proposal that there be no expropriation of privately owned land requires no elaboration.
  - b) The Chiefs' proposal that a Municipality or Local Government District suffer no loss in net tax income was addressed by them as follows:
    - "You will recall that we had suggested that funds should be made available for bands, especially in southern Manitoba having valid entitlements, where there is no local or

contiguous Crown land available of any economic importance. Those bands could then arrange to purchase private land nearby at fair market value and from those owners willing to sell. Such land could then become part of the reserve and subject to the Indian Act.

"Once that happens, however, then the effect of the local municipal tax base would be direct. Reducing is the countervailing factor, the fact that once the land becomes part of the reserve, the local municipal government would no longer be required to provide any of its services to that land and, accordingly, there would be an off-set in reduction in cost to the municipality.

"However, we do recognize the possibility of some instances where the cost reduction would not be equivalent to the lost revenue thereby resulting in a net loss to the municipality.

"Accordingly, we would propose that both levels of government recognize the responsibility which we perceive is a joint one to provide compensation to municipalities placed in a net loss position such as that. We perceive that there is a responsibility on both governments to compensate in this instance based upon a review of the Treaties and the Natural Resources Transfer Agreement.

"Our Treaties provide that at the time of setting aside lands for our reserves Her Majesty undertook to deal with third party interests fairly and justly but in a manner that would not diminish the amount of land required to be set apart. Likewise, as regards the occupants of Crown land, we reiterate our earlier comments that the rights of Crown land occupants must be respected and dealt with fairly in accordance with the terms of our Treaties with Canada.

"In resolving our Treaty land entitlements, we wish both levels of government to deal with us honestly and to deal as honestly with all others." (The Pas Public Hearing transcript pages 275-277)

8. In Saskatchewan the Provincial Government is considering compensating the Municipalities affected for such losses. It is not unreasonable to expect that the Manitoba Government may agree to undertake that relatively small burden in this province.

9. The Commission recommends that any Municipality or Local Government District suffering a net loss as a direct result of land entitlement transfer to a band or bands within its jurisdiction (ie. the amount of loss in tax revenue from the land transferred less the savings experienced by reason of a reduction in services) shall be compensated for such net loss in revenue by Canada and/or Manitoba.
- c) The Chiefs' proposal that the vested rights of any present users or occupiers of Crown land should not be transferred without the consent of such user or occupier requires some elaboration.
10. The Chiefs are to be commended for their generosity in considering the sensitivity and interests of non-Indians, in their efforts to resolve once and for all the debt due to them from Canada. But such lofty principles must be set in a realistic context to ensure that a contemporary final settlement of the land entitlement issue can be realized.
11. The Commission recommends that the parties agree to a time limitation of negotiation with the current occupants of Crown land which may be selected by the Bands; and if at the expiration of that term (of one year, for example) an agreement has not been reached with the occupants, or their consent has not been obtained, then the land shall be transferred in a manner which honors the existing vested rights of the present users or occupiers.

- d) The Chiefs' proposal that Crown land set aside for use as Parks, Wildlife Management Areas or similar public recreational use be not available for selection for purpose of the land entitlement debt requires no elaboration.

A. Purchase Policy to Full Land Entitlement Obligations

1. The Chiefs proposed that in return for excluding privately owned land, parks, wildlife management areas, land used as public recreational areas etc. from selection, that a purchase policy be established by agreement. This proposal seems to be realistic and advisable. The Chiefs elaborated on this proposal as follows:

Purchase policy: On May the 13th, 1982, the Hon. John Munro, Minister of Indian Affairs, stated that the Government of Canada realized that it would take several hundreds of millions of dollars to settle specific claims including Treaty land entitlements. In resolving a specific claim of the Penticton Band of British Columbia in the spring of this year, the Federal and Provincial Governments transferred several thousands of acres to the Band and the Federal Government awarded in addition the sum of 13 million dollars in settlement of that claim.

Moreover, the Federal Government has estimated that the settlement of the comprehensive claims that is in those areas of Canada where there are no Treaties with Indian people would cost in the neighbourhood of four and a half billion dollars and the Federal Government has taken the necessary steps to ensure that sufficient funds would be made available for the settlement of these outstanding issues.

We wish to bring to your attention, therefore, that a purchase policy is not only eminently fair and reasonable but that the financial resources required can be obtained."

2. Most of the entitlement bands are located above the 53° latitude (16 out of the 20 bands now validated). The four bands validated in "southern"

Manitoba claim a total of 56,000 acres more or less, while the "northern" 16 bands claim 555,000 acres more or less. The Chiefs are realistic in asserting the need to establish a fund to be available to the bands to enable them to purchase land from willing sellers, in order to realize in due course the land entitlement which is their due. Since this land entitlement is a debt due to a band arising out of a Treaty obligation it is a debt due by Canada to the band.

3. In the course of the "Informal News Conference" held by the Hon. J.C. Munro, the Federal Minister of Indian and Northern Affairs on November 16, 1982 (Appendix DD) the matter of a purchase policy was the subject of comment. The following excerpts are relevant:

Minister: "We have to work out some purchase policy with the province (Saskatchewan). In effect, third party interests aren't going to be prejudiced that are legal..."

Question: "The Manitoba Minister has suggested that rather than give back land in many cases they would consider financial compensation instead, but if that were the case the federal government would have to help if they could afford it. What's your policy on that?"

Minister: "As far as Manitoba is concerned, it's my same answer. I think our position, initially is that they have an obligation under the Transfer Act to give us quality land, quality Crown land, and the Indians are aware of that, that we expect them to do so. Now, if they want to put up some other propositions to substitute for that, that's something that we're obviously prepared to discuss."

The Commission considers these comments very encouraging since they appear to meet in principle the views of the Chiefs.



4. The land entitlement obligations to the Indian bands are a debt due by the Crown representing all Canadians and it seems both politic and equitable that the burden to repay that debt should be borne by Canadians generally. Nor does it appear inappropriate to view the cost of repayment of the debt to the Indian bands as deserving at least an equal priority to Canada's moral obligation to make relatively significant monetary contributions to disadvantaged third world countries.
5. The sensitivity of the Chiefs reflected in their proposals to the rights of private landowners, (occupiers and users of Crown land) land set aside for public purposes such as Wildlife Management Areas etc. reduces substantially land that would otherwise be available for selection as contemplated for example in the terms of Treaty 10. The Chiefs' proposal that the existing rights of occupiers or users of land be honored postpones the time when the Bands may enjoy in full the potential income from such land. These positions because they will avoid animosity between present owners, occupiers and users of land and in that respect serve the public interest. On the other hand these wise and laudable proposals accentuate the need of a land purchase policy funded by government to ensure that the Bands will obtain the amount and quality of lands to which they are entitled within a reasonable time.
6. The Commission recommends that the parties negotiate a realistic purchase policy which will enable the bands to purchase from willing owners of quality land such quantum of land as the parties agree the band is entitled to receive and may be available for purchase from time to time in payment of the remaining agreed upon land entitlement due.



The parties may consider establishing an interest bearing trust fund to which Canada may contribute annually as a means for giving practical effect to this policy.

XVI. A MECHANISM FOR IMPLEMENTATION OF THE AGREEMENT

1. The Mennonite Central Committee and the Interchurch Task Force et al, expressed the need for a mechanism to ensure expeditious implementation of the terms of any agreement reached. Indeed they urged that an agreement shall contain within it the mechanism essential to ensure its timely and appropriate implementation.
2. Their proposal is as follows:

"Mechanism for Implementation

It is our feeling that there are four distinct stages that lead to the final resolution of the Treaty Land Entitlement issue. Please allow us to elaborate these as we see them in our proposal for implementation.

Stage I The Agreement in Principle

Following the completion of the work of your Commission agreement on a legally enforceable agreement in principle will need to be negotiated between the Chief's Treaty Land Entitlement Committee and the Province of Manitoba and subsequently with the Government of Canada. In order that funding procedures neither bias nor subvert the resolution of this issue, the agreement in principle needs to include agreement on ways funding is to be secured and costs assessed.

Stage II Selection of Land

The Indian Bands affected by this agreement (with financial support as agreed upon in Stage One) will need to make their selection of land, compensation or a combination thereof. It is our understanding that a number of the Bands are prepared to make these selections quickly.

### Stage III The Panel of Adjudication

We propose that a panel be named to adjudicate the submission made by the affected Bands. We propose that the panel consist of an appointee of the Department of Indian Affairs, an appointee of the Government of Manitoba, an appointee of the Chiefs' Treaty Land Entitlement Committee and a fourth party appointed jointly by the other three parties, and not having a vested interest in the issue. The fourth member of the panel should also be considered the convenor of the panel. The purpose of the panel would be to process each of the individual submissions brought forward by the Bands and make recommendations to the Minister of Natural Resources of the Province of Manitoba for final implementation. The ways to fund the activities of the panel of adjudication would need to be established in the agreement of principle.

### Stage IV Implementation

It is our understanding of the Resources Transfer Act of 1930 that the Minister of Natural Resources of the Province of Manitoba is charged with the details of transfer of land to the Federal Crown for purposes of fulfilling Treaty land entitlements. It would also follow that he is obliged to remove encumbrances on selected Crown lands that have become encumbered since the 1930 transfer of Federal Crown lands to the Province of Manitoba. Entitlements that cannot be honoured in these ways would need to be compensated in accord with the agreement in principle.

#### 3. The Chiefs proposed the following:

"We would ask you to consider as part of your recommendations the matter of requiring the Province to establish as part of the selection process in resolving our Treaty land entitlements, an office within the Provincial bureaucracy with a mandate to deal directly with resolving our entitlements. The official head of that office should function at the department ministerial level and report directly to a Minister of the Crown. It is important that such an office be given the required authority perhaps even by means of legislation to deal with our entitlements and as well must be provided with sufficient financial, technical and human resources."

#### 4. Dealing firstly with the Chief's proposal, the Commission is of the view that the Province should appoint a suitable experienced and competent person to act as a Special Advisor to the Premier on all matters relating to land entitlement. Such a Special Advisor ought to have authority, inter alia, to:

- a) act as the representative of the government in negotiations concerning Treaty land entitlement; and,
  - b) deal directly with the representatives of the Chiefs of the entitlement Bands and Canada on such matters; and,
  - c) have direct access to the Premier to assist him to resolve any areas of conflict that may arise from time to time; and,
  - d) be given the responsibility to make every reasonable effort to reach a mutually acceptable agreement; and,
  - e) make every effort to expedite the execution of an agreement with Canada and the Land Entitlement Chiefs Committee.
5. The mechanism for implementation proposed by the churches representatives are laudable in their objective. As noted above the proposal of the churches contemplates four stages:
- a) The Negotiation of an Agreement.
  - b) The Selection of Land.
  - c) The Panel of Adjudication.
  - d) Implementation.

6. The Commission believes that the representatives of the parties (the Land Entitlement Chiefs Committee, Manitoba and Canada) will commence to negotiate a binding agreement on the specific matters the parties consider necessary, in order to conclude an enforceable agreement within a reasonable period of time.
7. Canada will no doubt continue to make reasonable amounts of funds available to ensure that the Bands can properly prepare for and be effectively represented in these negotiations.
8. A great deal of work has already been done by the Bands and their advisors, Canada, and Manitoba in preparation of their positions on the matters outlined above and hence agreement may be achieved quickly. If however, the parties are unable to resolve some of the matters, the parties may well consider the appointment of a neutral third party to monitor the negotiations; act as chairman during the meetings; have the power to convene meetings upon reasonable notice of not less than five working days; and if no progress is made, the authority to meet separately or jointly with one or more of the parties to explore the acceptability of an alternative accommodation.
9. After the agreement has been reached the Bands and Canada can realistically proceed to select the land the Band is entitled to receive. It may be practical to require that as soon as a band has made a selection of any part or the whole of its land entitlement it should forthwith notify the Province and Canada of the legal or other description of the land it has selected and set out all the encumbrances

and interests on, or in, the land of which it has notice. The province should promptly disclose all encumbrances or interests of which it is aware. When those have been identified the representatives of the parties should meet promptly to review the band's selection and decide, on the basis of the terms of the agreement already reached, what procedure the encumbrances or interests will be followed for the purpose of settling with the persons whose rights will be affected by the transfer to Canada of the land selected for reserve purposes.

10. The staff of the Province and Canada who are familiar with land resources, and have access to the records of encumbrances ought to assist each band by providing such information on request.
11. Once an agreement on the principal substantive matters is concluded, a wide variety of problems will arise which the parties will address and will preferably resolve cooperatively. There will also be problems involving other persons whose rights as current users or occupiers of Crown land will surface and will require to be resolved to make it possible for Canada to fulfil its obligations under the treaties and to make it possible for Manitoba to fulfil its obligations under the Manitoba Natural Resources Transfer Agreement.
12. Experience dictates that it is wise to establish a body which will facilitate the resolution of such problems, and be generally responsible to encourage timely implementation of the agreement reached between the parties.

13. The Commission therefore recommends that the parties establish a Board of Implementation consisting of a representative appointed by each of them for this purpose.
14. The duties of such a Board ought to include:
  - a) setting out the obligations that each party must perform pursuant to the terms of the agreement and setting out a time schedule in which each party shall complete its tasks.
  - b) The Board ought to meet at least once a month. The agenda ought to include a progress report from each member regarding the tasks assigned; and a copy of those parts of the reports which deal with a particular Band ought to be forwarded to such Band and a copy of each report ought to be sent to each party.
  - c) Each party should pay its representative on the Board and bear one-third of all other costs of administration.
  - d) The Board should perform such other functions as may be assigned to it jointly by the parties or as may be necessary to facilitate and expedite the implementation process.
15. This last omnibus duty needs some comment. While the duty and responsibility to fulfil the obligations to Indians under the Treaties lies on Canada's shoulders, the problems that inevitably arise in the course of performing that responsibility can be more efficiently and expeditiously dealt with cooperatively. Furthermore, by working together each party will learn from experience to better understand and appreciate the difficulties each party may need to surmount in its

efforts to achieve the common objective of finally settling the unfulfilled land entitlements. The joint efforts by such a Board will hopefully result in replacing such distrust as may exist with a reservoir of goodwill.

16. The Commission further recommends the establishment of a quasi-judicial tribunal in the following circumstances. In the course of implementing the agreement differences between the parties may arise as to the meaning, intention or application of the provisions contained in the agreement which the parties themselves are unable to resolve. In such event such difference should to be referable to a quasi-judicial tribunal for final and binding settlement as is provided by various statutes of the Province and Canada such as the Labour Relations Act.

#### XVII. THE LAND ENTITLEMENT POLICIES IN OTHER JURISDICTIONS

1. The Order-in-Council requires the Commission:

- 1.(b) To review past and existing policies and practices implemented in various provincial jurisdictions within Canada in their endeavours to extinguish treaty land entitlement.

2. With the assistance of Mr. Ken Davidson of the Manitoba Department of Natural Resources, knowledgeable persons in the governments of British Columbia, Alberta and Saskatchewan were contacted in October, 1982 requesting the information referred to in the Order-in-Council. A copy



of each of the letters sent to these persons are attached as Appendices "FF", "GG" and "HH".

3. In essence these letters state that:

...."I would appreciate your assistance in setting out for the Commission your past and present policies and practices and your efforts to settle unfulfilled treaty land entitlement. I would also appreciate your views as to the problems encountered and as well the successes achieved in relation to this matter."

4. The Province of British Columbia replied by letter dated November 1, 1982 a copy of which is attached as Appendix "II".

5. The Commission notes that there is only one Indian Treaty which relates to land in British Columbia, ie., Treaty 8. The government of that province takes the view that it has no outstanding obligation to Indians arising out of Treaty 8.

6. The response by the Province of Alberta to the Commission dated October 26, 1982, contains substantial details which may be of interest to the parties and is therefore attached as Appendix "JJ". The policy established by Alberta in 1977 is outlined in a letter from the Hon. Lou Hyndman, then Minister of Federal and Intergovernmental Affairs, dated October 14, 1977, which letter is part of Appendix "JJ".

7. In the letter dated October 25, 1982 from Ms. Donna Tingley of the Alberta Department of Native Affairs to Mr. Ken Davidson (also part of Appendix "JJ"), the following reference is made to a policy established by the Alberta Government in March 22, 1977:

"The land (is) to be transferred to the federal government, as trustee for the Indian lands, on the basis of 128 acres per band member, counted at the time of treaty signing, by way of land entitlement; reserving unto the Province of Alberta all mines and minerals.

As I indicated to you, Alberta is currently involved in discussions with the Cree Band at Fort Chipewyan regarding their treaty entitlement claim. Alberta has validated the Cree Band's claim and discussions on site selection will soon be taking place.

The Band has asked the Province to provide them with 24,000 acres of Provincial Crown land, including mines and minerals. Alberta has agreed with the size of the claim but the current policy will not permit the transfer of mines and minerals. However, the Ministers of Native Affairs and Federal and Intergovernmental Affairs have indicated to the Chief of the Cree Band that they are prepared to recommend to Cabinet that mines and minerals be transferred with the treaty land entitlement lands. No final decision has been made on this matter.

Alberta's policy regarding the treaty entitlement settlement process is described in the attached letter from Lou Hyndman to Hugh Faulkner dated October 14, 1977....

Some flexibility has been introduced into this process by recent practise. Formally, Alberta's policy required that treaty entitlement claims first go to the federal government who may then request land from the Province. In the case of the Cree Band's claim, the Province is participating in informal discussions with the Band, even though the federal government has not asked the Province for land."

8. It appears that little has happened in Alberta regarding unfulfilled land entitlement, and that the provincial policy has been to reserve "unto the Province....all mines and minerals" while "the (Alberta) Ministers of Native Affairs and Federal and Intergovernmental Affairs have indicated to the Chief of the Cree Band that they are prepared to recommend to Cabinet that mines and minerals be transferred with the treaty entitlement lands. No final decision has been made on this matter."

9. But I would refer the reader to the letter from the Hon. Warren Allmand to the Hon. Lou Hyndman dated June 23, 1977 (Appendix "CC"), which contains the comment that:

".... it has always been understood that upon transfer of lands to Canada for Indian reserve purposes, mines and minerals, and other subsurface rights would be and have been included in the transfer. The Natural Resources Transfer Act does not derogate from this position, for it states that all lands conveyed under Section 10 "shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof". You will also note that Section 11, incorporating by reference certain provisions of a 1924 Indian Land Agreement between Canada and Ontario, deals with the disposition by Canada of moneys derived from mineral developments on Indian reserves. This section could have no effect were the mines and minerals not included in lands returned to Canada for Indian reserve purposes."

10. I made arrangements through the Hon. J. Gary Lane, Minister of Inter-governmental Affairs in Saskatchewan, to meet on December 23, 1982 with his Associate Deputy Minister, Mr. Newton C. Steacy, who is responsible for formulation of recommendations and implementation of government policies and programs on Indian land entitlement and related issues. Mr. Steacy was very cooperative and helpful. A letter from Mr. Steacy to the Commission dated January 7, 1983 (Appendix "KK") was received January 12, 1983. It states:

"Re: Treaty Land Entitlement  
Province of Saskatchewan

Enclosed for your information are my comments concerning the minutes of our meeting. If I can be of any further assistance, please do not hesitate to ask."

11. He enclosed a memorandum (part of Appendix "KK") the relevant parts of which read:

"Mr. Steacy informed me that:

- a) The Premier of that province instructed him to prepare by fiscal year 1984-85 a comprehensive socio-economic development strategy in cooperation with the Federal Government which would provide an opportunity for Treaty Indian Bands to become self-sufficient. A preliminary strategy will be prepared during fiscal year 1983-84.
- b) The Premier considers that the method of validation used by Canada is subject to agreement by the Province. Two Bands which have been validated by the Government of Canada may have received less land than they are entitled. There are now 25 Bands in Saskatchewan that have an acknowledged unfulfilled land entitlement according to Canada.
- c) Where an Indian Band selects land that is of poor suitability the Provincial Cabinet may consider providing better land in order to emphasize quality, not quantity.
- d) Where there is a third party interest on land selected by a Band the Province acknowledges that a financial responsibility exists for the immovable assets.
- e) The Province also acknowledges that a financial responsibility exists to assist any municipality regarding any adverse impact on its tax base or income as a result of settling Indian land entitlement.
- f) The policy of the Province may be to transfer the quantum of land entitlement without reservation or may include whatever practical steps are necessary to enable the Band to develop and use the land as an economic resource base which will assist with self-sufficiency.
- g) The Government of Saskatchewan has assigned personnel from various departments to conduct reviews concerning the quality and potential of the lands selected to date; the location of additional available lands from which a Band may select their land entitlement; and the nature of third party interests in the lands selected."

12. It is also important to note the contents of the letter from the Hon. J.C. Munro to the Hon. J. Gary Lane, dated November 25, 1982 (Appendix "M"), because these are relevant to a better understanding of both Saskatchewan's and Canada's policy. This letter also reflects some of the variety of problems that arise in the course of implementing an agreement on land entitlement.

Of course, it is important to note that the latest agreement between Canada, a government of a province and Indian Bands was achieved in Saskatchewan in 1977. Attached is a copy of Canada's undated publication entitled "The Saskatchewan Formula - A Federal Provincial Agreement on the Fulfilment of Outstanding Treaty Land Entitlements." (see Appendix "LL")

13. The importance of this Federal-Provincial Agreement has been dealt with at great length in this report. While the Federal Publication identifies the settlement as a Federal-Provincial Agreement, the reader will note that its contents include not only relevant correspondence between the Federal and Provincial Ministers, but also letters to the Federation of Saskatchewan Indians pertaining to the role and authority of that "Umbrella" organization.

14. It is now over five years since that agreement was concluded. The implementation of the agreement is still proceeding. A variety of problems still require resolution and this report reflects, in part, the experience gained in that province and some of the lessons to be learned therefrom.

#### XVIII. CONCLUSION

1. I consider it advisable to make a few comments in conclusion. The terms of reference of the Commission were interpreted by me as requiring that

the public be given the opportunity to make representations as to their views of matters that should be considered in formulating policies that would lead to a fair and equitable agreement by which the unfulfilled land entitlements remaining due to Indian bands should be resolved. This was done by public hearings at which any member of the public could make representation. The transcripts of each of these Public Hearings are attached as Appendices "MM", "NN", "OO" and "PP".

2. Opportunity was given to the public to make private submissions; and informal meetings were held "to ensure free and open dialogue" undeterred by recording of the words uttered. Meetings were held with the Chiefs of the entitlement Bands, and with the Chairman of the Land Entitlement Chiefs Committee and his erudite advisors. I attended meetings held by the Bands on reserves and heard first hand the views of their members at their premises. My views were also enriched by the many meetings with representatives of organizations and companies who were able to share their genuine concerns regarding the potential impact of land entitlement policies that might ignore established rights of ownership or fail to protect the use of certain lands for public or quasi-public purposes. Very fortunately, most of these fears were allayed by the generous and statesmanlike position expressed by the Chiefs in their submissions to the Commission. These accommodations not only made the work of the Commission much easier but deserve the high commendation and appreciation by the people and governments of Manitoba and Canada.



3. Discussions were held with persons employed by Canada and Manitoba who had experience with land entitlement problems; persons who had been engaged in research on matters relating to land entitlement; and legal advice was solicited. Other people also assisted the Commission in its tasks.
4. A major contribution to the work of the Commission was made by the very voluminous material and historical documentation filed on behalf of the Chiefs of the entitlement Bands Committee by the Treaty and Aboriginal Rights Research Centre Inc. That material and documentation reflects years of dedicated work on this subject. It provided the Commission with a wealth of reliable information, and hence a better understanding of the issues addressed in this report.
5. The Commission, recognizing the time limits imposed on it, considered the essence of its purpose to be two fold:
  - a) to record the nature and substance of the representations made to it by non-Indians and Indians; and
  - b) to set out recommendations on the essential elements or principal matters that may, in its opinion, assist the parties in negotiations and in concluding a fair and equitable agreement which, when implemented, would lead to a final settlement of the unfulfilled land entitlement due to Indian Bands in Manitoba. The implementation of such an agreement will result in doing what is "necessary to enable Canada to fulfil its obligations under the



treaties with the Indians of the Province" as contemplated by Section 11 of the M.N.R.T.A.

6. I am indebted to many, and particularly to the assistance given and kindnesses shown by the very competent Ms. Linda Jolson, Assistant Deputy Minister of Northern Affairs. No request or problem was too burdensome for her or too minor to be ignored by her. Each was disposed of with efficiency and dispatch. There was no wasted discussion. Reasons for my gratitude to her include her engagement of Mr. M. Lewis Lockhart as my assistant, and the assignment of Ms. Jenny Paupanekis as the Commission's secretary/ receptionist.
7. I am unable to express in appropriate words my indebtedness to Mr. Lockhart and Ms. Paupanekis. Mr. Lockhart came to this task with many years of experience with the problems of Indian land entitlement. He shared that experience with me, and displayed great dedication, much understanding, and above all a high degree of integrity in his contribution to the work of the Commission. Ms. Paupanekis, by her devoted and efficient work, and particularly her very pleasant personality, created a very pleasing atmosphere in which to work.

Thank you all.



## SUMMARY OF RECOMMENDATIONS

### I. Tripartite Negotiations and Agreement

I recommend that the authorized representatives of Governments of Canada and Manitoba should forthwith meet with the authorized representatives of the Bands whose unfulfilled land entitlement claims have been "validated" by Canada and those Bands whose claims are still being reviewed by Canada and/or may hereafter be "validated" by Canada. All these Bands have established a Land Entitlement Chiefs Committee whose chairman is Chief Jim Bear of the Brokenhead Reserve. The purpose of the meeting ought to include, inter alia, the making of every reasonable effort to conclude a mutually acceptable agreement in writing that will contain the major terms and conditions to be implemented by each of the parties in order to settle, with finality, each and every outstanding unfulfilled land entitlement due to each Band. Such agreement ought also to contain an enforceable mechanism for implementation of all provisions in the agreement as expeditiously as practical.

II. The Method of Calculating the Amount of Land Remaining due to a Band

1. I recommend that in the interest of uniformity the Saskatchewan formula as agreed be the compromise, rather than the principle of current band membership. If this compromise is accepted by all parties it will mean that the applicable population date in Manitoba will also be December 31, 1976 and "beyond that date entitlement will not grow", as stated by the Hon. Warren Allmand in his letter to Premier Schreyer of Manitoba dated July 13, 1977. (App. "BB")
  
2. In order to encourage the parties to address the negotiations for settlement with dispatch and make every reasonable effort to conclude an agreement, the parties may agree that an independent neutral person acceptable to each of the parties be appointed to assist their efforts to reach agreement. Such a person ought to be the mediator, and the parties may agree to authorize such a mediator to give an opinion as to the failure of any party to negotiate in good faith and to set out in writing the basis on which he relies in reaching such a conclusion. The party or parties named ought to be given the opportunity to respond promptly and explain its alleged misconduct in writing. After this exchange of correspondence between the mediator and the parties affected the said correspondence may be made public by any party to the negotiations.

III. The Selection of Land; Settlement of Third Party Interests;  
Funding of Independent Expert Advice

1. a) that each Indian Band with land entitlement be given the opportunity to select provincial Crown land of such quality and in such location as the Band may decide, provided:
  - (i) that selection of land by a Band is within the area ceded by the Treaty to which the Band is signatory, and
  - (ii) that selection of land by a Band is from Crown land that was unoccupied Crown land as at July 15, 1930.
  
- b) that the land which has been selected be transferred to reserve status subject to settlement of any third party interests in the land, in a manner acceptable to such third party and the governments of Canada and Manitoba, provided:
  - (i) that settlement of any third party interests must be reached within a time limitation (one year, for example) as may be agreed by Canada, the Bands and Manitoba, and,
  - (ii) if settlement is not reached within that prescribed and agreed upon term and the third party has not negotiated in good faith, the land will be transferred to reserve status in a manner which honors the existing rights of such third party.

2. I consider that any agreement which will increase productivity, generate greater economic activity, improve the well-being of under-privileged Indian people, and thereby reduce economic dependency on governments, is consistent with the public interest.
3. It is also essential that the Indian Bands be provided with adequate funds to enable them to make a prudent land selection based on independent expert advice as to the viability each parcel of land may furnish to an owner.
4. I would recommend that the work of the experts employed be made available to each party in order to avoid unnecessary duplication and expense. If work has already been done in this area then the documentation and findings should be shared with all parties. If the parties cooperate in sharing information both time and money will be saved.

IV. Procedure to be followed where Province requires land hereafter transferred to Reserve for bona fide public purpose

1. The Commission recommends that when lands to be transferred to fulfil entitlement may be required by the province for a

specific project to serve a bona fide public purpose, that the principle outlined in Treaty 10 (para. 41) shall apply, and that it be given practical effect.

2. The Commission recommends that the procedure which will be described be included in the proposed agreement to govern only lands to be transferred as reserve land to fulfil the outstanding land entitlement due to certain bands. This procedure shall be followed in circumstances where the Province requires a portion of reserve land for a specific project required to serve bona fide public purposes.
3. The procedure recommended is:
  - (a) The province shall undertake to give written notice to Canada and each Band affected of its requirement to obtain certain reserve land. The said notice shall describe the area of land required for the specific project to serve bona fide public purpose.
  - (b) If Canada and the Band(s) which may be affected agree that the public purpose is bona fide, then the authorized representatives of Canada, the Bands affected and those of the Province shall meet not later than 30 days thereafter,



unless the authorized representatives unanimously agree otherwise, to hear explained fully the project for which the area of land is needed and the adverse and/or favorable impacts the specific project is expected to have on the Band's assets and/or its residents. If any of the parties, including the Bands affected, question in writing within four weeks after receipt of the notice, the bona fides of the specific project as one required by the Province to serve the public interest, then this issue shall forthwith be referred to the tribunal consisting of one or four persons as hereinafter described, for final and binding determination. If the tribunal determines that the specific project is required to serve the public interest, then the bands affected hereby agree that such determination shall constitute consent by each of those bands to Canada to proceed to do what is necessary to convey the land required to the Province on such terms as the tribunal may have imposed.

- (c) If neither the Bands affected nor Canada question the bona fides of the need of the reserve land by the Province for the aforesaid purposes, then it shall be held that each Band affected has given its consent to Canada to do what is necessary to convey the land required by the Province for

that project, by reason of such Band(s) having received land entitlements pursuant to the terms of this agreement.

The said representatives shall commence forthwith to negotiate and make every reasonable effort to reach a mutually acceptable settlement concerning compensation and/or selection of alternate lands and/or other forms of compensation which may be acceptable to the parties.

(d) If the parties agree that a deadlock has occurred in the negotiations concerning alternate lands and/or compensation, or a period of more than three months have elapsed, whichever occurs later, and each party has negotiated in good faith and made every reasonable effort to reach a mutually acceptable settlement, then any party having conducted itself as contemplated herein may give notice in writing that it wishes to refer the matter of compensation for final and binding decision to an impartial tribunal.

(e) If the party giving notice seeks a four person tribunal, it shall in its notice give the name and address of its nominee, and each of the parties receiving the notice shall in writing give the name and address of its nominees to the other parties within ten (10) working days after receipt of

the notice. The nominees of each of the parties shall meet within ten (10) working days of the date of their nomination for the purpose of agreeing to a fourth member who shall be the chairman of the tribunal. If they are unable to agree on a chairman within five (5) working days of their first meeting or if any party has failed to appoint its nominee then the nominees shall so inform the parties, and any party may then request Justice R. A. Matas of the Court of Appeal or Justice Guy Kroft of the Court of Queens Bench or Judge Patrick Ferg of the County Court to appoint the fourth member of the tribunal, or the nominee of any party that failed to nominate its nominee.

- (f) Each of the nominees shall, when agreeing to act, also indicate in writing that he is able and willing to act expeditiously and will make himself available without any undue delay.
- (g) The tribunal shall first endeavour to assist the parties to reach a mutually acceptable resolution, and only if no progress is made within a reasonable time in the opinion of the chairman, shall the tribunal hold quasi-judicial hearings, and determine the following matters:

(i) Whether the specific project as described is or is not for a bona fide public purpose, if that is a matter of contention between the parties referred to the tribunal; and

(ii) If the tribunal decides that it is not for a bona fide public purpose then that is the end of the matter. If it is bona fide, then the tribunal shall decide what ought to be the amount of compensation in land, money, remedial measures or other like compensation, or in one or more of these forms or compensation, it being understood that the band shall have the opportunity to decide what form or forms of compensation it shall receive.

(iii) The decision of the tribunal shall be in writing and shall be delivered by Registered Mail to each of the parties within 40 working days after the date of the first meeting of the tribunal.

(h) The parties or the tribunal may by unanimous agreement extend or alter any or all time limits mentioned herein.

V. Expropriation of Privately-owned Land; Loss of Revenue by a Municipality or Local Government District; Land used for Public Parks, Wildlife Management Areas or similar Public Purposes; Land occupied or used by third parties

The Commission commends the following proposals of the Land Entitlement Chiefs Committee:

1. That no privately owned land be expropriated to settle land entitlement.
2. That Municipalities and Local Government Districts be reimbursed for net loss in tax revenue due to transfer of land within their jurisdiction to fulfil Indian land entitlement.
3. That Public Parks, Wildlife Management Areas and similar public interest projects not be available for selection to fulfil land entitlement due to a Band.
4. That existing vested rights of present users or occupiers be honored but that if such land is selected and no agreement is reached within a specified period then the land shall be transferred in settlement of entitlement subject to the existing vested rights.

VI. The Practical Necessity for Funding a Land Purchase Policy

The Commission recommends that the parties negotiate a realistic purchase policy which will enable the bands to purchase from willing owners of quality land such quantum of land as the parties agree the band is entitled to receive and may be available for purchase from time to time in payment of the remaining agreed upon land entitlement due. The parties may consider establishing an interest bearing trust fund to which Canada may contribute annually as a means for giving practical effect to this policy.

VII. Appointment of a Special Advisor to the Premier on Indian Land Entitlement

The Commission is of the view that the Province should appoint a suitable, experienced and competent person to act as a Special Advisor to the Premier on all matters relating to land entitlement with specified scope of authority.

VIII. A Mechanism for Implementation of the Agreement Concluded; A Board of Implementation; A Tribunal to resolve differences as a meaning of Agreement

1. The Commission recommends that parties agree to establish a Board of Implementation with specified duties to monitor progress in implementing terms of agreement.
2. The Commission further recommends establishment of a quasi-judicial tribunal to resolve differences regarding meaning, intention or application of the terms of the agreement similar to tribunals for final and binding settlement of differences as provided in Labour Relations Acts.



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| "F"        | Advertisement to invite and receive comments from<br>the public appeared in the Winnipeg Free Press on<br>October 8, 9 & 11, 1982.                            | 8                          |
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| "VV"       | Long Plain Band                                                                                                      | 24 & 25                  |
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| "FFF"      | E. Deschenes                                                                                                         | 20                       |
| "GGG"      | Mennonite Central Committee, Native Ministries, Conference of Mennonites in Canada.                                  | 30 & 31<br>See App. "NN" |
| "HHH"      | Manitoba Committee of the Communist Party of Canada                                                                  | 33<br>See App. "NN"      |
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